

John

REPORT OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH.

BY

JAMES LUKIN ROBINSON, ESQ.

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. IX.

CONTAINING THE CASES DETERMINED
FROM TRINITY TERM, 15 VICTORIA, TO EASTER TERM, 15 VICTORIA:
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

TORONTO:

HENRY ROWSELL.

1853.

REPORT OF JAMES

REPORT OF THE

COURT OF QUEEN'S BENCH

JAMES LUTIN BOWLING

REPORT OF THE COURT OF QUEEN'S BENCH

TOL. IX

REPORT OF THE COURT OF QUEEN'S BENCH
JAMES LUTIN BOWLING
REPORT OF THE COURT OF QUEEN'S BENCH
JAMES LUTIN BOWLING
REPORT OF THE COURT OF QUEEN'S BENCH
JAMES LUTIN BOWLING

H. ROWSELL, PRINTER, TORONTO.

HENRY ROWSELL

JUDGES

OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS :

THE HON. JOHN BEVERLEY ROBINSON, C. J.

“ WILLIAM HENRY DRAPER, J.

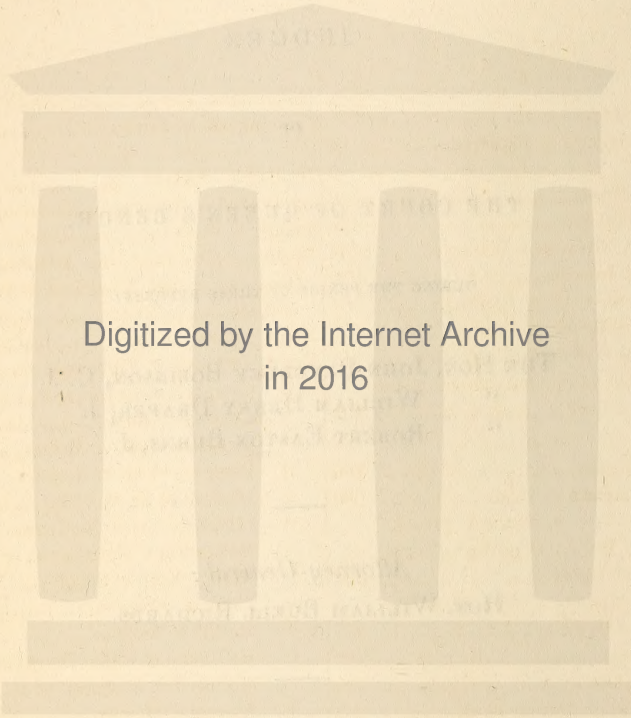
“ ROBERT EASTON BURNS, J.

Attorney-General :

HON. WILLIAM BUELL RICHARDS.

Solicitor-General :

HON. JOHN ROSS.



Digitized by the Internet Archive
in 2016

A

TABLE

OF THE

NAMES OF CASES REPORTED IN THIS VOLUME.

A		PAGE.			PAGE.
Allen v. Skead.....	217		Crookshank, <i>In re</i>	677	
Attorney General v. Stanley	84		Cunningham v. Duane.....	274	
B			D.		
Beaver v. Reed.....	152		Darling v. Wallace	611	
Blain v. Oliphant	473		Davis et al. v. Browne.....	193	
Bloomley v. Grinton & Watkins.....	455		Delany v. Moore	294	
Brennan v. Prentiss.....	372		Dickson (Executors and Devises in		
Browne et al. v. G. S. Boulton.....	64		trust of) v. The Municipal Council		
Brown & McDonell v. Browne	312		of Galt.....	257	
Brown et al. v. Carroll.....	314		Doe v. Langs.....	676	
Brown v. The Municipal Council of the			Doe d. Burnham v. Simmonds	436	
County of York.....	453		“ Campbell v. Crooks	639	
C.			“ Connors v. Roe.....	82	
Cæsar v. Norton	100		“ Davidson et al. v. Gleeson	607	
Canada Company v. Pettis	669		“ Dempsey et al. v. Boulton	532	
“ v. Howard, Treasur-			“ Dickson et ux v. Gross.....	580	
er of the United Counties of York,			“ Elmsley et ux v. McKenzie.....	559	
Ontario and Peel.....	654		“ Henderson v. Seymour et al....	47	
Canada Company v. The Municipal			“ Kerr & Kerr v. Schoff.....	180	
County of Oxford.....	567		“ Lount v. Simpson.....	544	
Carr v. Dunn.....	246		“ McGill v. Langton.....	91	
Castle v. Rohan.....	400		“ McGillis et al. v. McGillivray et al.	9	
Caswell et al. v. Catton et al.....	282		“ McQueen v. McQueen et al.....	576	
“ v.	462		“ Meyers v. Meyers.....	465	
Charles v. Carroll.....	357		“ Meyers et al. v. Marsh	242	
Church v. Foulds.....	393		“ Morgan et al. v. Boyer.....	318	
Clandinan v. Dixon et al.....	266		“ O'Connor & Rouse v. Maloney...	251	
Clarke v. Proudfoot et al.....	290		“ Pettit v. Ryerson.....	276	
Clarkson v. Hart	348		“ Prince et al. v. Girty	41	
Clement v. Donaldson	299		“ Sheldon v. Ramsay et al.....	105	
Corbett v. Hopkirk	479		“ Sherwood v. Mattheson	321	
Counter v. Morton	253		“ Stata v. Smith et al.....	658	
Coyne v. The Municipal Council of			“ Stevens et al. v. Clement.....	650	
Dunwich.....	309		“ Taylor v. Proudfoot.....	503	
Coyne v. The Municipal Council of			“ Wilkins v. Moore et al.....	445	
Dunwich	448		Dougall, an Attorney, v. Ockerman...	354	
			Dowling v. Miller.....	227	

	PAGE.		PAGE.
Dwight v. Ellsworth.....	539	McLeod v. McLeod	685
E.		McMurrich et al. v. The Bond Head	
Eberts v. Traveller	355	Harbour Company.....	333
F.		McQueen et al. v. McQueen.....	536
Fallis v. Claus & Kerby	272	Malloch v. Scott.....	428
Farley et al. v. Graham	438	Marmora Foundry Co. v. Jackson.....	509
Farmers' & Mechanics' Building Society		————— v. McElroy	509
v. Langstaff	183	Matthie v. Rose.....	602
Farmers' & Mechanics' Building Society		Metcalf, <i>q. t.</i> v. Reeve & Gardner.....	263
v. Whittemore	297	Mitchell v. Noble et al.....	555
Frazer v. Lazier	679	Montreal Mining Co. v. Cuthbertson...	78
G.		Moore et al., Assignees, &c. v. Cook...	261
Gerow v. Clark.....	219	Moore v. Jarron	233
Grierson v. The Provisional Municipal		Municipal Council of Essex, Kent, and	
Council of the County of Ontario...	623	Lambton v. Baby.....	34
H.		Municipal Council of Frontenac, Len-	
Hall & Platt v. Gilmour	492	nox and Addington v. Chestnut et al.	365
Harnden v. Proctor.....	592	O.	
Harvey v. Fergusson	431	O'Neill v. Carter	254
Hawkes v. Richardson et al.	229	———— v. ————.....	470
Hill v. The Municipal Council of Wal-		Orser v. Mounteny et al.....	382
singham.....	310	Otto v. Pelan et al.....	363
Houlston v. Parsons	681	P.	
Howard v. Wilson.....	450	Peck et al. v. Phippon.....	73
Hughes v. The Mutual Fire Insurance		Phillips v. Masson et al.....	20
Company of the District of Newcastle	387	Plant v. Stone.....	458
J.		Powell v. Currier.....	352
Jones v. Walker et al.....	136	R.	
K.		Regina ex rel. McNamara v. Christie	
Keeley et ux v. Raile.....	666	& Painter.....	682
Kennedy v. The Municipal Council of		Regina ex rel. Clarke v. McMullen	467
Sandwich	326	———— v. Gamble & Boulton.....	546
Kerr et al. v. Gordon et al.....	249	———— v. Humphreys.....	337
L.		———— v. Lafferty.....	306
Latham, an Attorney, v. The Law So-		———— v. Patton	307
cietiy.....	269	Richardson v. Phippen.....	255
Law Society v. Dougall et al.....	541	Rogers v. Lake.....	264
Lawler v. Sutherland	205	Ross <i>q. t.</i> v. Meyers.....	284
Lossing v. Jennings.....	406	S.	
M.		Sams v. The Corporation of Toronto...	181
McCarthy v. Perry et al	215	School Trustees of the town of Brock-	
McDonell v. McDonell.....	259	ville v. The Town Council of Brock-	
McDougall v. Ridout et al.....	239	ville.....	302
McGill v. The Municipal Council of the		Scott v. Vance	613
County of Peterboro.....	562	Silverthorne v. Gillespie, Moffatt & Co.	414
McIntosh v. Stephens	235	Smith v. Ingoldsby.....	207
McKechnie et al. v. McKeyes.....	563	Story v. Durham	316
McLean v. Horton.....	331		

TABLE OF CASES.

vii

T.	PAGE.	W.	PAGE.
Thompson v. Leslie.....	360	Wafer v. Taylor & McLean	609
Tompkins v. Scott et al.....	103	Wilkes & Buchanan, President and Treasurer of the Brantford Building Society v. Clement et al.....	339
Torrance v. Privat	570	Wood et al. v. Hutt et al.....	344
Twynam v. Bingham.....	409	Wright et al. v. Cook.....	605
Tylee v. The Municipal Council of Waterloo.....	572	Wright v. The Municipal Council of the Township of Cornwall.....	442
Tylee v. The Municipal Council of Waterloo.....	588		

REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

TRINITY TERM, 15 VICTORIA.

Present :

THE HON. J. B. ROBINSON, C. J.

“ MR. JUSTICE DRAPER.

“ MR. JUSTICE BURNS.

DOE DEM. MCGILLIS ET AL. V. MCGILLIVRAY ET AL.

4 Wm. IV. ch. 1, sec. 17—*Grantee of Crown not in possession—Power to demise—Will, construction of—Joint tenants—Estate vesting in them at different times.*

The effect of the exception, 4 Wm. IV. ch. 1, sec. 17, in favour of a grantee of the Crown who has never gone into possession, is, that while ignorant of the fact of his land being in the actual possession of some other person, he is not to be regarded as disseized, and consequently is in a condition to demise.

The testator devised certain lands to his brother's two eldest sons, “in case of their coming to Canada, and claiming the same.”

Held, by Robinson, C. J., and Burns, J., that though the devisees took as joint tenants, yet that either of them by coming to Canada could entitle himself to his moiety.

Draper, J., dissentiente, who held that the condition in the will was entire, and while unperformed in any part no estate could pass.

Ejectment for east half of lot 37, 8th con. Lochiel.

On 14th January, 1822, the crown granted the whole lot 37 by patent to John B. McGillis, who, on 26th November, 1830, made his will, containing this devise : “I lastly bequeath to my brother Donald's two eldest sons the east half of lot 37 in the 8th concession of the township of Lochiel, in case of their coming to Canada, and claiming the same.” The lessors of the plaintiff were the two eldest sons of Donald McGillis. The testator died soon after making his will. Donald McGillis, one of the lessors of the plaintiff, came to this country in 1848, from Scotland, before the day of the demise laid in the declaration.

At the time of the patent issuing the lot was wild and unoccupied.

The defendant's counsel at the trial moved for a non-suit ; he contended that the will created a joint tenancy, being made before the statute 4 Wm. IV. ch. 1, and the condition is, "*in case they*" (that is *both*) *come to Canada*, and one only has come.

The learned Judge (Draper, J.,) thought the estate had not vested, but reserved the point, and the case proceeded. The defendant gave evidence that about twenty one-years ago one Wm. McGillivray was in possession of *the lot*, and died in possession ten or twelve years ago, leaving Malcom, his eldest son, who conveyed to Donald McGillivray (one of the defendants) by deed, dated 7th October, 1838, and registered 24th April, 1849. Consideration, 100*l.* for the 200 acres.

One witness swore that William McGillivray was in possession twenty-eight years and more without interruption, and that the defendant Donald, his son, had been in actual possession ever since his death, which occurred about twenty-eight years ago. This same witness swore that William McGillivray had paid *Donald McGillis* for half the lot—not saying for which half, nor which Donald McGillis he bought from, nor when, nor on what part of the lot William McGillivray or his sons had lived.

It was proved by another witness that on 13th September, 1826, one Donald McGillis made a deed of this lot 38 to William McGillivray for 60*l.*

For the plaintiff it was then proved that the testator (the patentee) had never taken actual possession of the lot, nor ever knew that it was occupied ; that in 1830, the testator having made a deed of the west half of this lot to one of his sons, that half was sold by that son to Wm McGillivray. There seems to have been some mistake about the lot—the family supposing that the lot owned by their father was a different one—and though they heard that one Donald McGillis had sold to McGillivray, yet they imagined it was a different lot, and one they were not concerned in.

The learned Judge, at the conclusion of the case, still

reserving leave to the plaintiff to move, directed the jury to find for the defendant, considering that the devise had not taken effect by reason of the non-fulfilment of the condition. As to the Statute of Limitations, the jury found that there had been 20 years' continued dispossession of the patentee, and of those claiming under him, but that the patentee had no notice of the land being occupied.

A verdict was taken for the defendant.

VanKoughnet, Q. C., moved that the verdict be set aside, and a verdict entered for the plaintiffs, pursuant to leave reserved at the trial. He contended that nothing could vest till both came to Canada.

Brough shewed cause.

Cases cited : 1 Saund. 180, 186 ; 1 Taunt. 571 ; 2 D. & R. 38 ; 1 M. & Mg. 130 ; Cro. Jac. 259 ; 2 Str. 1172, 2 Bro. C. C. 233 ; 1 Inst. 2196 ; 9 Mod. 210 ; 3 Ves. 89 ; 2 Ves. 233 ; 15 Ves. 48 ; L. Ray. 64 ; Cro. Jac. 259 ; Yelv. 183 ; 12 E. R. 57 ; 1 Lord Ray. 312 ; 2 Vern. 477 ; 3 Atk. 330 ; 1 Wills. 159 ; 1 Ch. Ca. 132 ; 1 Vent. 147 ; 1 P. W. 384.

ROBINSON, C. J., delivered the judgment of the court.

The finding of the jury upon the point of possession leaves this case free of difficulty, except as to any doubt that arises on the legal effect of the condition in the will. It was clearly not necessary, as a general principle, that the patentee should enter, in order to give him a capacity to devise ; he would be regarded as in actual possession by virtue of his patent, so long as no one else was in adverse possession claiming the fee. When he made his will in 1830, there was, it appears, another person in possession and not in any privity with him, but yet not really claiming adversely to him, or under any idea of interfering with his right, but occupying the patentee's lot under an error ; and he was not shewn to have been in actual possession of the particular portion of the lot which is in question in this action.

But it is not material to examine into the grounds of William McGillivray's possession, or to what portion of the lot it should be considered as extending ; because the jury

having found that the patentee had no knowledge of the occupation, the facts shew it then to be a case within the exception of the 17th clause of 4 Wm. IV. ch. 1, and the effect of its coming within that exception I take to be, not merely that a twenty years' possession held by another under such circumstances does not bar him, but that during the time that he is without knowledge of his land having been taken possession of, he is not to be regarded as dis-seized, and consequently is in a condition to devise. And before this statute was passed, we have held that a patentee of lands is not disabled from devising merely because a stranger may have gone upon the land without his knowledge while it was still in a state of nature, and lived upon it, but, for any thing that appears, not claiming title.

Then, as to the condition annexed to the devise by John McGillis, the patentee: "I give and bequeath to my brother Donald's two eldest sons the east half of lot 37 in the 8th concession of Lochiel, *in case of their coming to Canada, and claiming the same.*" This will being made in 1830, the 148th clause of our statute 4 Wm. IV. ch. 1, does not apply to it, and we must therefore look on the devisees as joint tenants. They may, however, sever in their demises, as they have done in this declaration, and each may recover for his moiety, which would be a severance of the joint tenancy. We are to consider then, whether the facts of the case enable both or either to maintain ejectment under the devise. The condition of coming to Canada and claiming the estate, I take to be plainly a condition precedent to the estate vesting; and that the only question is, whether one of the devisees (Donald McGillis) having come to this country, and now claiming the land, and thus bringing himself within the condition, can recover for his interest; or whether nothing vests till both the devisees have come, on the principle that the will creates a joint tenancy, and that the condition is entire.

It is certain that under the terms of this devise both the devisees have the whole of their lifetime in which to perform the condition; consequently, it cannot be that either, by coming to Canada, can entitle himself to the estate of

the other, because it remains open to the other to come at any time and claim it. Can one of them by coming to Canada entitle himself to his moiety? I consider that he can, and that the case is no other than if the devisor had had devised to two infants on condition that they should live to attain the age of twenty-one years. Such a will would, I think, vest the estate in each as he came of age, and they might be still joint tenants; for it is allowed that the estates of joint tenants may have a different commencement, as in the case of *Aylen v. Choppin* (Cro. Jac. 259; *Yelv.* 183; *Doe Marsack v. Read*, 12 E. R. 57,) and *Oates v. Jackson* (Str. 1172). In 1 Inst. 188, it is said, "In some cases there may be joint tenants, and yet the estate may vest in them at several times."

Conditions are to be construed liberally according to the intention of the grantors, and in a will the intent is more especially to be regarded. Now it is not reasonable to suppose that the testator could have meant that the estate of either of his nephews should depend upon the conduct of the other, in a matter in which neither could control the other. It is therefore reasonable to construe the will in this respect distributively—that is, he gives to his nephews this estate jointly, on the condition that the estate of neither, shall vest till he comes to Canada; but that the estate of either, when he comes to Canada, shall vest for his interest leaving the estate of the other to commence whenever he comes.

I think, therefore, a verdict should be entered for the plaintiff, on the count which lays a demise by Robert McGillis.

BURNS, J.—My opinion upon the construction of this will is, that the lessor of the plaintiff, Donald McGillis, is entitled to recover the one undivided moiety of the half lot devised. I think the words of the condition—that is, "in case of their coming to Canada, and claiming the same,"—are to be read distributively, and do not necessarily mean that both must come before either can take. It is in that respect like the case of a legacy given to several persons to be divided on condition of their executing a release of the testator's estate; those who release are not to

be deprived of their shares because others will not release. Vide *Haws v. Warner* (2 Vern. p. 477).

The only difficulty in the case is the rule in cases of joint tenants, as it is said there must be unity of time in the vesting of the estate ; but I confess that I do not feel myself pressed by that, after an examination of the authorities. The case put by Lord Coke (Co. Lit. 188) seems to be authority for the assertion that a unity of time is required in the vesting of the estate ; yet in *Shelley's case* (101 A.) it is said, " If a man makes a feoffment in fee to the use of himself and his wife that shall be, and afterwards he marries, his wife shall take jointly with him, as it was held in Lord Pawlet's case (17 Eliz. 3 Dyer, 340)." Again, in *Samme's case* (13 Co. 56) it is said " that joint tenants might be seized to an use, although they come to it at several times ; as if a man maketh a feoffment in fee to the use of himself and to such a woman as he shall after marry for term of their lives, or in tail, or in fee ; in this case after he marrieth a wife, she shall take jointly with him, although that they take the use at several times, for they derive the use out of the same fountain and freehold, *i. e.*, the feoffment." And again, " so if a disseizin be had to the other at another time, they shall be joint tenants, but the use of two, and one of them agreeth at one time, and otherwise it is of estates which pass by the common law." See also *Aylen v. Choppin*, Cro. Jac. 259 ; Yel. 183 ; *Earl of Sussex v. Temple*, 1 Lord Ray. 312 ; *Oates v. Jackson*, 2 Str. 1172 ; *Gratton v. Best*, 2 Bro. C. C. 233.

Sir Wm. Blackstone says, in speaking of the case in *Dyer*, that it was because the *use* of the wife's estate was in abeyance and dormant till the intermarriage, and being then awakened had relation back, and took effect from the original creation. Mr. Woddeson, in his lectures, speaking of what Sir Wm. Blackstone stated as to unity of time, has this passage : " As to unity of time, or the necessity that the estate of each joint tenant should be vested at the same period, the learned commentator cites a case put by Sir Edward Coke ; but this point, if not contradicted, is rendered doubtful by many authorities." Mr. Thomas says,

in his notes upon Shelley's case, that the point put is usually referred to as an authority that though at common law joint tenants cannot take at different times, yet that it does not hold in reference to the leasing of uses or executory devises. Mr. Crabb, in his work on real estates, adopts the same view, for he says (sec. 2304) that the *rule seems to be confined to limitations at common law, and not to extend to estates raised by way of use or by devise*. When it is said that the title of joint tenants may be destroyed by the destruction of any of its unities, that of time is excepted—for that being past, cannot be effected by any subsequent transactions.

I do not consider it material at present to inquire into the question, whether any difficulty may arise by reason of the other devisee never coming to this country, but dying abroad without claiming the estate : but, so far as the possession is concerned, I think the will should be read distributively, so that each becomes entitled to the possession as he comes to this country ; and, as one of several joint tenants may maintain ejectment for his proportionate share of the title, the plaintiff here may recover. If the other devisee should come to this country, and claim the property, it must be under the same title ; and so soon as he does that, it would have relation back to the time and mode by which and when the title was created, and so no incongruity would arise. The present action merely relates to the question of whether the lessor of the plaintiff is entitled to a present possession of an undivided moiety of the half lot, and I must say I think he is.

DRAPER, J.—The question arises on the necessity of the other devisee, John, coming to Canada, before the estate devised will vest in either.

It will, I presume, be conceded that if neither of the devisees had come to Canada, but had both died without so coming, the devise would not have taken effect, and no estate would have vested in either, I take it to be a clear case of condition precedent.—Vide *Johnson v. Castle*, *Winch*, 116 ; *Acherley v. Vernon*, *Wiles*, 153 ; *Harvey v. Aston*, 1 *Atk.* 361 ; *Randall v. Payne*, 1 *Br. Ch. C.* 55 ; *Ellis*

v. Ellis, 1 Sch. & Lef. 1 ; Lamphill v. Bayley , Pre. Ch. 562 ; Long v. Dennis, 4 Burr, 2052 , Garbet v. Hilton, 1 Atk. 318 ; 9 Mod. 210 ; Stackpole v. Beaumont, 3 Ves. 89 ; Falkland v. Bertie, Holt, 230 ; 2 Ves. 233 ; Reeves v. Herne, 5 Vin. Ab. 343, pl. 41 ; Gillett v. Wray, 1 P. W. 384 ; Large v. Cheshire, 1 Vent. 147 ; Lester v. Garland, 15 Ves. 48 ; Fry v. Porter, 1 Ch. Ca. 132 ; Patten v. Reddy, 1 Wils. 36 ; Elton v. Elton, 1 Wils. 159 ; Reynish v. Martin, 3 Atk. 330 ; Snow v. Cutler, T. Ray. 64.

Then, it is to be considered that this is a condition, to create an estate—between which and a condition to destroy an estate there is a difference ; “for a condition that is to create an estate, is to be performed by construction of law as near the conditions as may be, and according to the intent and meaning of the condition—albeit the letter and words of the condition cannot be performed ; but otherwise it is of a condition that destroyeth an estate, for that is to be taken strictly.”—1 Inst. 219, b.

I take it the condition of coming to Canada and claiming this lot, is not a condition to *create an estate* within the meaning of the aforesaid passage. The section of Littleton shews that it refers to a deed, conditioned that the feoffor shall make a conveyance or conveyances to parties, and for estates set forth—or reserving a right of entry to the feoffor in certain events. This is more like the case mentioned in Plowden, 7 a.,—That if one leases his land to A. for so many years as J. S. shall name, A. may not enter into the land before J. S. hath named the number of years, for perhaps he never will name any years, and then A. shall never have any interest in the land.

For the words here do not first give an estate to the testator's nephews, on a condition, for the breach whereof the heir may enter ; but the estate is to vest on the performance of the condition ; the condition is annexed to the devise of the fee. Till the condition is performed the estate descends to, and vests in the heir-at-law : the devise is executory—being of a freehold to commence *in futuro*, without any previous disposition of the fee.—Cro. El. 878 ; 2 P. W. 28 ; 1 Atk. 422 ; 2 Ves. 521.

The devisees would have time during their lives to come to Canada—but they must come—their heir cannot fulfil the condition—Co. Lit. 209 a.; Lit. sec. 337; 2 And. 73; Bothy's case, 6 Co. 31.

The case of Lord Bertie v. Falkland (2 Vern. 333, 12 Mod. 182) is very strong to shew that where an estate is devised to vest on the performance of a condition (vide 1 Mod. 300)—*i.e.*, the marriage of the devisee with A., which marriage, *from A.'s default*, does not take effect—there the estate cannot vest in the devisee.

In Acherley v. Vernon (Willis, 158,) L. C. J. Willis says: "If it plainly appear to be the intent of the testator that the devisee shall not have the benefit of the devise unless he perform a certain act enjoined him by the devisor, this is a condition precedent, and the devisee shall have no benefit of the devise until he perform it, even though the condition be never so unreasonable, if it be not illegal or impossible;" and a devise there was held to fail, because the devisee, a married woman, did not execute a release (a condition precedent), although it was urged that she could not execute an effectual release unless her husband joined with her in a fine, and he might refuse so to do; but it was answered that it was not therefore an impossible condition, but only a condition which it was not entirely in her power to perform.

And the whole condition must be performed. For where it is copulative—*i. e.*, that there should be a marriage and issue male—unless the entire condition be performed, no estate will arise—Wood v. Southampton, Show. P. C. 83; Com. Rep. 732. See also Snow v. Cutler, L. Ray. 64.

The testator died before the statute of 1834 was passed; and without the aid of that statute (sec. 48), the words of the will make the devisees joint tenants. There is no sort of modifications to convert it into a tenancy in common.

It is laid down as a general rule that the estate must become vested in all the joint tenants at one and the same instant, as well as by one and the same title.

There is a class of cases, however, which to a certain extent qualify this rule; such as Aylen v. Choppin, Cro.

Jac. 256 ; Blandford v. Blandford, 3 Bulstrode, 101 ; Stratton v. Best, 2 Br. Ch. Ca. 233 ; Oates ex dem. Hatterley v. Jackson, 2 Str. 1172.

In all those cases, however, where the estate vested in any one person, or in more than one, such person or persons became entitled to the whole, although the *quantity* of their interest might be changed as others came into *esse* entitled equally with themselves; and if the first person; or any one of the persons in whom the estate vested, survived all the others—including those who came afterwards into *esse*—such survivor would be entitled to the whole, or would be entitled to the whole if no persons afterwards came into existence who took a share. The estate was entirely vested, or, as is said, the root was joint; though as to the several parties entitled, it may take effect in possession at different times.

But here, the difficulty is to hold that under the words “in case of *their* coming to Canada, and claiming the same,” the estate can vest until *both* come to Canada. It is in effect to read the will thus; “To my brother Donald’s two eldest sons the east half of lot No. 37, 8th con. Lochiel, in case of *either of them* coming to Canada, and claiming the same.” For if it be conceded that the words of the devise create only a joint estate, the right of survivorship is the principal incident to this estate; and there cannot be such right unless there be more than one tenant; nor can the one party *sever* the joint tenancy before it has taken effect. Therefore, if the estate has vested under present circumstances, it cannot be on a literal construction of the words “in the event of *their* coming to Canada,” which has not yet happened; but these words must be read “in the event of either coming to Canada;” for the *whole estate* must, to bring it within the class of cases I have referred to, vest in the first taker or takers—so that, if there should never be any others entitled, such taker or takers would have the whole—a construction which it appears to me cannot be given to the words “in the event of their coming to Canada.” And, if the brother who had come, would not (on the death of his brother without coming to Canada) be entitled to the whole, then no joint estate has ever vested;

for there can be no joint estate to which survivorship is not incident.

See the following cases :—Oates v. Jackson, 2 Str. 1172 ; Tuckerman v. Jefferie, Holt. 370 ; Hawes v. Hawes, 1 Wil. 165 ; Burgess v. Robinson, 3 Mer. 7 ; Dowsel v. Sweet, Amble. 176 ; Humphrey v. Tuillem, Ambl. 136 ; Davis v. Kemp, Carth. 45 ; 1 Eq. Ca. Ab. 216, pl. 7 ; Carth. 3 ; Orl. Bridg. 387 ; 2 Leon. 120 ; 3 Leon. 18, 19 ; Holt. 222 ; Orl. Bridg. 384.

Upon the whole, it appears to me that the devise was to the two to take as joint tenants, upon condition of their coming to Canada, and claiming the estate ; and that in the mean time, and until the joint estate vested, the premises descended to the heir-at-law. And that no joint estate could vest until the two devisees come to Canada and claim.

If the devisee who has come to Canada is allowed to recover, he surely can only recover a moiety. The other moiety cannot be vested in the co-devisee, for he has not fulfilled the condition : it must then remain in the heir-at-law. The devisee recovering must therefore hold an undivided moiety. He cannot be joint tenant with the heir ; for there is no room for asserting any *jus accrescendi* as between them. Nor do I think he can be tenant in common with the heir ; for if he were, and died, leaving the other devisee, his share ought to descend on his own heirs, and not survive to the other devisee ; and yet, if the other devisee came afterwards to Canada he would have a right to his moiety as joint tenant, which would carry with it the right of survivorship, and so the first devisee would die seized as tenant in common, and yet the estate would not go to his own heir. Nor can it be said, I think, that the devisee who has come—if he recovers—can sever the joint tenancy by any act of his own before his co-devisee comes out ; for that would be to enable him to sever the joint tenancy before it has come into existence. Nor can his recovery of a moiety defeat the claim of the other devisee, who, whenever he comes to Canada, has a right to the other moiety as joint tenant, and has the whole period of

his lifetime to come out and claim. The devisee who has come has again no right to recover his moiety, except as joint tenant; joint tenant with the heir he cannot be, for the reason given; joint tenant with his co-devisee he cannot be until the latter fulfils the condition. If he recovers, therefore, he recovers an estate which the will has never given—that is, a tenancy in common with the heir.

I think the defendant entitled to the *postea*, because the condition is entire; and, while unperformed in any part, no estate whatever can pass by the will.

PHILLIPS V. MASSON ET AL.

Bankruptcy—7 Vic. ch. 10—*Ordinance L. C. 2 Vic. (3) ch. 36—Pleading—Evidence—What not a fraudulent concealment of property.*

Where the wife of a bankrupt in L. C. had a remainder in lands in U. C. expectant on the death of her mother :

Held, that there was no interest which could vest in her assignees, and that his not disclosing such interest was not fraudulent.

Held also (DRAPER, J., *dissentiente*), that the certificate obtained by a bankrupt, under the ordinance of L. C. 2 Vic. (3) ch. 36, prior to the passing of 7 Vic. ch. 10, may be given in evidence under the general issue, in like manner as the certificate and confirmation thereof by the Court of Review, as provided by the said act, may be.

Under the same pleadings evidence may be given of fraud on the part of the bankrupt, in obtaining his certificate.

Scire facias to revive a judgment against the defendants, Masson and Colquhoun. The latter allowed judgment to go by *nil dicit*. Masson pleaded that after the recovery of the judgment named in the *scire facias*, and before the issuing of the *sci. fa.*, he became a bankrupt: concluding to the country.

At the trial, before Draper, J., at the last Spring Assizes for Cornwall, the defendant, in support of his plea, produced a certificate under the hand and seal of William Badgley, Esquire, therein described as one of the commissioners of bankrupts in that part of the province heretofore known as Lower Canada, bearing date the 11th September, 1841, certifying that defendant (whose estate has been assigned for the benefit of his creditors, according to the provisions of the ordinance of Lower Canada, 2 Vic. (3) ch. 36, and who has made a full disclosure and delivery of all his estate, and has in all things conformed himself to the direction of

the said ordinance), by force of the ordinance, "is absolutely and wholly discharged from all the debts which have been or shall be proved against his estate, assigned as aforesaid ; and from all debts which are provable under the said ordinance and due to any persons who were resident within that part of the province of Canada heretofore known as the province of Lower Canada, on the 31st day of May last, being the day of the first publication of the notice of the warrant issued for the seizure of the estate of the said Guillaume A. Masson, and from all demands against him for or on account of any goods or chattels wrongfully obtained, taken, or withheld by him, according to the form of the ordinance aforesaid ;" and that he is, "by force of the ordinance aforesaid, for ever exempted from arrest and imprisonment in any suit, or for any proceedings, for or on account of any debt or demand whatever which might have been proved against his estate, assigned as aforesaid."

The statute 7 Vic. ch. 10, sec. 74, enacted that the certificate of discharge obtained by any bankrupt from any of the commissioners acting under the ordinance, at any time before the passing of that act—or under any commission or warrant in bankruptcy then subsisting, or which should be issued before the act came into effect—should, from and after the passing of the act, be deemed valid and effectual as a discharge to such bankrupt throughout the province from all debts due by him at the date of such commission, and made provable under such commission. The 73rd sec. of that statute repealed the ordinance of Lower Canada, saving the validity of all proceedings had thereunder. The 64th sec. enacted that any bankrupt sued, after his certificate is confirmed, for any debt due or demand provable under the commission against him, "may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence ; and such bankrupt's certificate and the confirmation thereof shall be sufficient evidence of the trading, bankruptcy, commission and other proceedings precedent to the obtaining such certificate."

The 61st section makes provision for the granting of cer-

tificates, and declares that no certificate shall be a discharge to the bankrupt, unless the judge granting it certify under his hand and seal to the proper Court of Review that such bankrupt has made a full discovery of his estate and effects, and in all things conformed to the provisions of the act, and that there does not appear to be any reason to doubt the fulness of such discovery; nor unless the bankrupt make oath in writing that such certificate was obtained fairly and without fraud; nor unless the allowance of such certificate shall, after such oath, be confirmed by the Court of Review, against which confirmation any of the creditors of the bankrupt may be heard before such court.

No proof of the ordinance of Lower Canada was given, but it was admitted that the plaintiff resided in Lower Canada, and that the defendant resided in Upper Canada some time before his bankruptcy.

The certificate was admitted to be genuine, as it purported. A duly certified copy of the original list of the bankrupt's creditors put in before the commissioners of bankrupts, was also put in, shewing his debts to amount to 759*l.* 6*s.* 1*d.* The name of W. S. Phillips & Co. appeared therein as creditors for 41*l.*, on judgment.

This was the evidence given by defendant in support of the issue: and for the plaintiffs it was objected that the statute 7 Vic. did not give this general form of pleading, except in cases of bankruptcy under the act; and that to set up a discharge under the ordinance of Lower Canada, a special plea was necessary. It was intimated that the judge's opinion inclined in favor of the objection, but he overruled it *pro forma*.

The plaintiff then averred that the defendant had fraudulently concealed and withheld from the creditors and assignees under his bankruptcy certain real estate and effects, which he was possessed of or entitled to in Upper Canada at the time of his bankruptcy, and gave in evidence duly certified copies of the inventory of the defendant's effects as disclosed by him—of the schedule of his estate, debts and credits, shewing a loss of 421*l.* 5*s.* 7½*d.*—of several examinations of the bankrupt, and of an affidavit

made by the bankrupt, 11th September, 1841, that the schedule given in was just and true; that he had delivered to the messenger all his estate (as set forth in the inventory), except such parts as were exempt from attachment, or had been necessarily expended for the support of himself and family; and all books, accounts and papers relating to his estate in his possession when the messenger demanded them; and that he had delivered to the assignee all such estate, books and papers as had since come to his possession; and that no part of his estate or effects was made over or disposed of in any manner for the future benefit of himself or family, or to defraud his creditors.

The plaintiff then put in (by admission) a copy of the will of John Flanigan, dated 3rd August, 1828, devising to his daughter Nancy, her heirs and assigns forever, the half of lot number 8, in the rear of the first concession, and the whole of number 9 in the 1st concession Charlottenburg, containing 150 acres; and to his daughters Margaret and Nancy one hundred acres each in the township of Nepean, to have and to hold to them, their heirs and assigns, and containing this clause—after the first devise to Nancy, and after several other dispositions of real and personal property, and before the devise of the land in Nepean—"I do hereby authorize my loving wife Margaret to have the charge, sole management, and enjoy the profits thereof as heretofore, of all my real and personal property during her natural life, or so long as she shall be capable of so doing—after which the same is to go to my children, as hereinafter and before mentioned and devised."

It was admitted that the land in Charlottenburg was held by the testator under a lease for 999 years. The testator died not very long after the date of the will; and Nancy was married to the defendant about sixteen years before the trial. There was issue of the marriage one child, about fourteen years old. Then it was proved that the defendant had, before going to Lower Canada, occupied the property in Charlottenburg, or some part of it, which was demised to Nancy; that an allowance has been, and still is, paid to them out of this property by the occupant, a brother of

Nancy's; that the land in Nepean has been sold; and that within the last three years the defendant has received 50*l.*, part of the proceeds, and is to get a further sum of 25*l.* on this account; and that Margaret, the widow of the testator, was still living.

The jury were directed to inquire whether the defendant did withhold and suppress from the knowledge of the commissioner and assignee in bankruptcy any interest he had in right of his wife under the will; and that if he did so, it was evidence of fraud on his part, which, if found, would entitle the plaintiff to recover; and in the event of their finding this fraud, they should find for the plaintiff—leave being reserved to defendant to move to enter a verdict for him, if he ought in law to have succeeded.

The jury found for the plaintiff.

The *Solicitor General* shewed cause against the rule *nisi* to enter a verdict for defendant, or for a new trial on the law and evidence, and for misdirection. He contended, that to avail himself of a certificate of bankruptcy obtained from a commissioner acting under the ordinance in Lower Canada, the defendant must plead it specially; but if the certificate were receivable under the general issue authorized by that statute (7 Vic. ch. 10, sec. 64), then the plaintiffs could give evidence of fraud in obtaining it, without pleading it (8 T. R. 609; 1 Ea. 6; 4 D. & R. 658; 2 H. Bl. 654; 5 Ea. 124). That the bankrupt had an interest which could have been sold.—4 U. C. R. 390; 7 U. C. R. 585.

VanKoughnet, Q.C., contra. The 64th sec. of 7 Vic. is the same as the English statute 5 & 6 Vic. ch. 122, sec. 42. Where the certificate is granted *after* action brought, it must be pleaded specially.—2 M. & S. 549; 1 B. & Al. 22; 6 Bing. 686.

The 60th sec. of 7 Vic. does not apply to a certificate obtained under the ordinance. The 74th sec. makes such certificate a discharge, and sec. 64 allows the act which makes it a discharge and the special matter—namely, the certificate—to be given in evidence under the general issue.

The 74th sec. admits no question of fraud—for it makes the certificate so obtained conclusive.

He contended that Masson had no interest which could pass to the assignees, for his wife had no present right, but merely a chattel interest to which she would be entitled on the death of her mother; and at any rate, that land in Upper Canada could not pass in Lower Canada as bankrupt's property.

ROBINSON, C.J.—Our statute 7 Vic. ch. 10, was precisely the same in its language as the English act 6 Geo. IV. ch. 16, sec. 126, under which it has been determined that the plea of bankruptcy, in the general form authorized by the act, may and should conclude to the country, although it introduced new matter; and it follows, as a consequence therefrom, that the plaintiff may, without replying fraud, which he cannot do, give in evidence under the *similiter* anything that would make the certificate of discharge void. —1 P. Wm. 259; 10 Mod. 248; 4 T. R 156; 6 Bing. 686; 8 M. & W. 624; 2 M. & S. 549; 3 Camp. 499; 1 B. & Ald. 23.

If, therefore, in this case the defendant could give the certificate of discharge in evidence under the plea that is on the record, it would follow that the plaintiff was at liberty to meet it by evidence of any fraud that would make it void. But the first question is, whether this general plea was admissible in the case, or only in cases of bankruptcy and certificates granted under 7 Vic. ch. 10, and confirmed by the Court of Review. So general a form of pleading would not have been sufficient at common law, as the court held in *Pitt v. Chapelow* (8 M. & W. 634). Then it is only to be considered whether the statute 7 Vic. ch. 10 authorized it in this case. It is the 74th clause alone which gives to the certificates granted in Lower Canada the effect of a discharge, and that clause says nothing respecting the manner in which such certificate shall be pleaded.

If the compendious and convenient form of plea which the legislature does authorize by the 64th clause in respect to certificates granted in Upper Canada, extends (and which I dare say they may equally have been willing to extend) to those granted in Lower Canada—if that form can be

held to be made available under the 7th Vic. ch. 10, it can only be under the 64th clause, which provides "that *any bankrupt* who shall, after *his certificate has been confirmed* have an action brought against him for any debt provable under the commission, may plead *in general* that the cause of action accrued before he became bankrupt, and may give that act and the special matter in evidence, and such bankrupt's *certificate* and the *confirmation* thereof shall be sufficient evidence of the trading, bankruptcy, commission, &c."

The statute in all its clauses up to the 64th clause had reference only to proceedings which were to take place under that statute, and we should not know till we came to the 73rd and 74th clauses that any other proceedings in bankruptcy were in contemplation for any purpose. The 73rd clause repeals the ordinance 2 Vic. (3) ch. 36, under which this defendant was made a bankrupt, but provides for the completion of proceedings begun under it. The 74th clause enacts "that the certificate of discharge obtained by any bankrupt from the commissioners acting under the ordinance in Lower Canada, or under any commission or warrant in bankruptcy then subsisting, or which shall have been issued before this act shall come into operation, *shall, from and after the passing of this act*, be deemed valid and effectual as a discharge to such bankrupt throughout Canada from all debts due by him at the date of such commission, and made payable under it."

As to any certificates of discharge to be granted under 7 Vic. ch. 10, they are required by the act to be confirmed by the Court of Review established in Lower Canada and Upper Canada respectively. Whatever certificates might have been granted by the jurisdiction acting in Lower Canada, required, for all that appears, no confirmation by any judge or tribunal distinct from the judicial officer who granted them; and the one granted in the case before us seems, from the form of it, to be in itself *ipso facto* a discharge.

Under these circumstances the question is, whether the 64th and 74th clauses can be read together, so that what is said of certificates in the 64th clause can be taken to apply as well to the certificates spoken of in the 74th clause as

to those certificates which are the subject of the several clauses preceding the 64th clause, and to which the 64th clause no doubt will apply, whether it will for any other purpose embrace the others or not.

It is a doubtful question. I believe one of my brothers is of opinion that only those certificates can be taken to be referred to in the 64th clause, or rather can be affected by it, which shall be granted under the act, and not those which had been granted under the ordinance. I incline to the opinion that a more comprehensive construction may properly be given to that clause; and as I have little or no doubt that the intention was to embrace all certificates, we should I think give it that construction, if it can be done without unduly extending its meaning. I do not, on consideration, see that any difficulty arises from the use of the word "confirmed" in the 64th clause. It is true that all certificates to be thereafter granted would require to be confirmed under the act, and that the expression is therefore proper as to them; but I do not think it therefore follows that only those certificates as were thereafter to be confirmed by courts of review can be treated as coming within the 64th clause. If that were so, then any bankrupt arrested after the passing of the act for a debt provable under the commission must find bail or lie in gaol, although he holds a certificate granted under the ordinance, which under the 74th clause is made a discharge from the debt; and there is rather an important provision in the 64th clause of which he would not have the advantage, though I am persuaded it must have been meant to extend to such persons, and that it has been always so construed. And so also the 76th clause of the statute could not, if the construction must be so narrowed, be extended to persons who had obtained their certificates under the ordinance; but there can be no doubt, I think, that the legislature—though they do in that clause, as well as in the 64th, speak of persons who shall have obtained their certificate *and the confirmation thereof*—do not mean to confine the provision to those whose certificates should under the statute be confirmed by courts of review. They only meant, I think, both

in the 64th and 76th clauses, to require that the certificates, in order to confer the privileges given by those clauses, should be certificates finally upheld, not certificates requiring confirmation, which they might or might not receive. And we must consider that the 74th clause is in itself an absolute confirmation of all certificates that had been granted under the ordinance repealed by that act, making them valid and effectual as a discharge throughout the province ; and I think, therefore, that as no other confirmation of these can be required, they may be held to be on the same footing as the other certificates, which are, in the other manner pointed out by the act, made final discharges. If we do not so treat them in general, inconveniences would follow, and the act would be plainly defective in several respects ; and if we do for any purpose hold them to come within the 64th and 76th clauses (and there may be others, as, for instance, the 65th clause), then I think we should hold that they may be pleaded in the general form allowed by the 64th clause ; and my opinion is, that we should so determine. I thought so on the argument, but was disposed afterwards to think that the use of the words “ shall have been confirmed, “ would exclude them, but a closer examination of the act has brought me back to my first opinion, that the privilege of pleading the bankruptcy in a general form, and giving the act and special matter in evidence, applies to these certificates as well as to the others.

Then the second question is, whether the certificate in this case was not made void by the alleged concealment of property.

The 60th clause makes such concealment a ground for avoiding the certificate ; and though that provision does not apply in this case, it has been held that on common law principles a certificate obtained by fraudulent imposition would be void. As to what was proved in this case, my opinion is, that nothing that is shewn respecting the leasehold property in Charlottenburg could have that effect, for there was nothing there that could vest in the assignees. The testator's widow was to enjoy that estate for her life, and we cannot judicially say that anything would remain

of the term. As to any income the bankrupt might have received in fact from it as a matter of favor, unless he still retained the money in his hands, which is not shewn or pretended, no information need have been given of that; and whatever might be his hope of future assistance being afforded to him or his wife from it, that could constitute no item of property in contemplation of law, for he had no claim to anything. As to the land in Nepean, the sale was made within three years (it is stated)—that is, in or about 1848—more than six years after the certificate was obtained, and indeed after the passing of the statute 7 Vic. ch. 10.

That statute, in the 74th clause, makes all certificates theretofore granted an absolute discharge, in such unequivocal terms that it should be nothing less than fraud apparent that can entitle us to refuse giving effect to them. Now here the bankrupt's wife had a remainder in 100 acres in Nepean, expectant on the death of her mother; the interest was hers—he could not sell it, nor compel her to sell it,—and it would not vest in the assignees; it was, moreover, land not situate in Lower Canada; and it is not shewn that under the ordinance it was his duty to make a return of property so held. We must suppose that it would not be his duty, for his creditors had no claim legal or equitable to expect to have their debts paid from the legal estate of his wife.

DRAPER, J.—It appears to me that the statute of Canada does not extend to permit the general form of *pleading* discharge by bankruptcy, in a case where the bankruptcy proceedings were under the ordinance of Lower Canada. The statute 7 Vic. makes a certificate of discharge under that ordinance available as a discharge throughout Canada, but, in my opinion, leaving the party to plead it according to the usual form of pleading, not extending the provisions of the 64th section to a case like this.

BURNS, J.—First: Is the general plea of bankruptcy and denial thereof sufficient to permit the defendant to give in evidence his certificate obtained under the ordinance of Lower Canada, and for the plaintiff to avoid the certificate

by proving that the defendant did not make a disclosure of property which would by law pass to the assignees? I think it is, and that it was not required to plead the certificate specially. The 73rd section of the general bankrupt law repealed the ordinance of Lower Canada, and the 74th section declares that certificates obtained before the passing of the General Bankrupt Law shall be deemed valid and effectual as a discharge to such bankrupt throughout this province. The difficulty as to whether the general plea of bankruptcy is sufficient, is created by the expression used in the 64th section, where it is said the certificate shall be available after it shall have been confirmed; and such certificate, and the confirmation thereof, shall be sufficient evidence of certain facts. The question is, whether the language of the 64th section, where it says that the defendant may plead in general that the cause of action accrued before he became bankrupt, and may give the act and the special matter in evidence, is to be construed as applicable to the cases of the certificates mentioned in sec. 74, or is to be restricted to the certificates, which are confirmed, as provided for by the General Bankrupt Law. The 61st section enacts that no certificate shall operate as a discharge until confirmation by the Court of Review. This provision was a great change from the provisions of the ordinance, under which the certificate, so soon as granted by the commissioners of bankrupts, operated as a discharge. The General Bankrupt Law imposed the duty upon the bankrupt of obtaining a confirmation of his certificate, which under the ordinance was not required. The object of the legislature in the 74th section was to render the certificate, which, only had operation in Lower Canada, available to bankrupts throughout the province; and we are to consider whether the legislature intended, or whether the language of the 64th section is such that we must construe it as an intention that although the certificates so obtained under the ordinance should operate as a discharge throughout the province, yet there was and is a difference in the mode of pleading them. If the 64th section is to receive this limited construction, then those bankrupts who have received certifi-

cates prior to the General Bankrupt Law are in a much worse position than those who have received them since that time. Thus, if such a bankrupt were arrested, he could not be discharged upon entering common bail, but would be driven to plead the matter specially, and must remain in prison till the determination of his plea, unless the court would interfere summarily. Again, if a judgment were obtained against the bankrupt before the bankruptcy, and he were taken in execution, notwithstanding he might have obtained such certificate of discharge, yet the court could not summarily discharge him for want of the confirmation. Again, no bankrupt who had obtained such a certificate as obtained in this case could be entitled to the advantage offered him under the 76th section, because here again is the same term, *the confirmation of the certificate*.

The 73rd and 74th sections shew that although the ordinance was repealed, yet that the proceedings under commissions then in course of being worked were to go on, and they would go on, I apprehend, under the new law, because there is no special provision for their mode of being worked.

I do not suppose the legislature ever meant that any difference should exist between the position of parties who had obtained certificates upon the passing of the general law, and those who have obtained them since; all that was intended was, that the additional restriction of having the certificate confirmed should be imposed upon the bankrupt. The whole difficulty may at once be reconciled by reading and construing the 74th section as a legislative confirmation of those certificates so granted under the ordinance. It may be said that if the 74th section is to be so construed, and that the 64th section shall be applicable to certificates of that description, yet that the plaintiff could not shew that the certificate was void, because of the bankrupt having concealed his property; but we have only to read the words *such certificate*, and *with intent to defeat the object of this act*, mentioned in the 60th section as applicable to all certificates under the repealed law, and the certificates mentioned in the general law. I see no violence

done to the words by so construing them ; and unless we do so, we must suppose the intention of the legislature to have been, that one mode was to prevail as respects one class of persons, and another as regards another class ; and this I cannot think, when one general law to place all apparently upon the same footing seems to have been meant and intended. If the 74th section is to be construed by itself, irrespective of the other provisions of the act, then, although the bankrupt who had obtained his certificate in Lower Canada, in respect of those matters I have already mentioned, would be in a worse position than one who obtained his certificate since the passing of this act yet in other respects he would be much better off ; because if the certificate is to be deemed valid and effectual as a discharge throughout this province from all debts due by the bankrupt at the date of the commission, and made provable under the commission as the section declares, then it would follow that the creditor could never set up any of the matters mentioned in the 60th section to defeat the operation of the certificate.

The provisions of the 60th section, enabling a creditor to defeat a certificate, are confined to any such certificate as may be obtained by virtue of the 59th section, which *shall not release or discharge the bankrupt unless the same be obtained, allowed and confirmed, according to the provisions of the act.* The result of this would be, that though the creditor could shew that the bankrupt had property in Upper Canada where he set up the certificate which should and ought to have been disclosed and surrendered to his assignees, yet he could not be allowed to (unless he could at common law) impeach the certificate, and he could only to a plea setting up such certificate, simply deny its existence, and could not contest its validity. I cannot think the legislature contemplated such a result as leaving the party to contest the certificate obtained in Lower Canada on common law principles, when it extended the operation of the certificate to discharge debts in Upper Canada which the bankrupt owed ; for it is to be observed that not another provision of the ordinance is extended to

Upper Canada. It would be satisfactory to know how the provisions of the 74th section are construed in Lower Canada, in reference to certificates obtained under the ordinance, though I do not see that it would make any difference with us, because in Lower Canada the effect of, and the proceedings upon, a defence under a certificate obtained under the ordinance would be construed under the ordinance. I think it more reasonable to construe the provisions of the act, both in favor of the creditor and the bankrupt, as applicable to extended certificates, than to treat them as totally isolated under the 74th section, and I think the language of the preamble of the act favors that view; and that language is this, that it was desirable to repeal the ordinance and to provide by a general law of the province for the discovery and securing of the estates and effects of bankrupts, for the benefit of their creditors and for the administration and distribution thereof, and also for the relief of such traders as shall, without any fraud or gross misconduct, have become unable to pay all their debts in full, and who shall have made a full disclosure and discovery of all their estates and effects.

Secondly: The next question is, whether the defendant has omitted to make a disclosure of his property and effects—that is, of such estate and effects as may be distributable among the creditors. And here a difficulty would arise if the provisions of the general law be not applicable, because the ordinance is not introduced, and we do not know by that what property is declared to pass to the assignees; but under the 31st section of the general law such property of the bankrupt, both real and personal, which he could in any way have lawfully sold, assigned or conveyed, or which might have been taken in execution on any judgment, is declared to vest in the assignees. I do not see that the property in question, which is devised to the wife of the bankrupt after the determination of her mother's life-estate, the mother still being alive, is anything that the bankrupt could have sold, assigned or conveyed, or that could have been taken in execution. The bankrupt, with his wife, might have disposed of her interest, but she could not be

compelled to do so; and if she did it voluntarily, she would be entitled to the proceeds.

I think the defendant was entitled to have succeeded at the trial.

MUNICIPAL COUNCIL OF ESSEX, KENT, AND LAMBTON, V.
C. BABY.

Motion to set aside interlocutory judgment and cognovit—Principal and surety.

The defendant was one of two sureties in a bond on which the obligees sued. An arrangement was made between his principal, his co-surety and the plaintiffs, to which he did not consent as to himself, but to which he offered no objection as regarded his principal and surety. Subsequently an action being brought on the bond against him, he allowed judgment to go by default, and gave a cognovit reserving any means he might have in equity to relieve himself. He now applied to set aside the judgment and cognovit, which, under the circumstances, the Court held could not be done. *Quære*: Whether the release given by the warden to the principal and one of the sureties, as mentioned in the statement and judgment of the Court was binding at law?

The defendant, C. Baby, was one of two sureties in a bond. An action being brought on this bond, 30th July, 1850, an arrangement was proposed on 2nd October, 1850, at the consideration of which defendant was present; and it was then proposed that the principal, J. B. Baby, and the other surety, Hall, should be released on certain payments being made by them. The now defendant, who was the other surety, did not object to being held liable at all if his principal was released, but only objected to the amount it was intended he should contribute; and in consequence the arrangement was not concluded. This arrangement failing, the council gave directions to their attorney to proceed in the action on the bond, whereupon an arrangement was effected between the principal J. B. B., one of the sureties, Hall, and the council. Confessions were taken from them, and a release given them by the warden of the council, sealed with the seal of the council, saving the council's right of action against the other surety, the now defendant, C. B. This was on the 8th of October, 1850. The council then brought their action against C. B., and he allowed judgment to go by default, and afterwards, to avoid the necessity of an assessment of damages at the assizes, gave a confession of judgment on or about the 11th of April, 1851, with a condition attached thereto, that the actual amount of damages should be determined by arbitrators, (at whose

meetings C. B. subsequently attended,) and that he should rely on a suit he had instituted in Chancery for any relief from any liability from the bond sued on in this action. In the spring of 1850, an action by J. B. B. against C. B. had been arranged, by C. B. admitting that upwards of 1700*l.* was due to J. B. B. A verdict had been also found in another action brought by J. B. B. against C. B. for 1000*l.*; and on the 25th October, 1850, C. B. gave a release to J. B. B. of all claims whatsoever, which he might by any means have against him, either in law or in equity. He, defendant, now applied to set aside the interlocutory judgment and confession, and filed an affidavit, stating that he was no party to the arrangements between the council and his principal and Hall—admitting however, that the proposition was named to him before completed; that the arrangement itself was made known to him on 9th October, 1850, and that he considered himself discharged; but that the council proceeding against him he took the advice of counsel, stating, as he then believed, that no release under seal had been made to the other obligors in the bond; that, being advised that he had no defence at law, he took the course above mentioned, and that it was not till the 18th or 19th of May, 1851, that he knew positively of the existence of the release under seal.

A. Prince, shewed cause against the rule *nisi* to set aside interlocutory judgment and confession. He contended that it was not necessary that defendant should have been a party to the arrangement between the council and the obligors of the bond; it was enough if he knew of and assented to it.—*Philpott v. Aslett* (*a*). His discovery of the release being under seal would be no sufficient reason in equity, and he referred to the defeazance in the cognovit which confined him to equity for any remedy. He, defendant, had released his *principal* before plaintiff released him, and so the reason in *Smith et al. v. Winter* (*b*) for discharge fails. He could have no remedy against his principal (*c*).

(*a*) 1 C. M. & R., 85; *Blight et al. Exors v. Brewer*, 3 Dowl. 266; *Davison v. Franklin*, 1 B. & Ad. 142; *Flight v. Chaplin*, 2 B. & Ad. 112.

(*b*) 4 M. & W. 454.

(*c*) *Bucks Rep.* 517; *Boulthbee v. Stubbs*; *Owen v. Hornad*, 18 Ves. 20; 14 Jur. 821.

J. H. Cameron, Q. C., contra, insisted that the arrangement was without the defendant's consent, which is all that is material. He referred to the defeazance as supporting this application. He denied that defendant had released his principal from such liabilities as would preclude him from recovering for this.

ROBINSON, C. J., delivered the judgment of the court.

It is on these statements and papers that the plaintiffs resist the application now made to us by the defendant to set aside the interlocutory judgment and cognovit, and let him in to plead the release given to J. B. Baby by the warden, as discharging him, the defendant, from all liability under the bond sued on this action.

The application is founded on an affidavit of the defendant, in which he swears that he was not in any way a party to the arrangements by which the suits against J. B. Baby and Hall were discontinued ; and these cognovits, taken for 1000*l.* each, payable on the 1st of January, 1852 ; and he speaks of the arrangement as a fact "*which he afterwards learnt,*" though he admits "that the agreement or proposition was named to him before it was completed ;" that he declined to accede to it, owing to J. B. Baby having then sued him on his bond as surety for Wood : that the above arrangement having come to his knowledge through John Prince, Esq., the counsel for the plaintiffs, (the District Council,) by letter written 9th October, 1850, informing him that J. B. Baby and Hall had been discharged by the plaintiffs, *he considered* himself altogether discharged from this action, which conclusion Mr. Prince afterwards confirmed by expressing his opinion to that effect in presence of him, the defendant, and of the plaintiffs' attorney, and the warden of the county : that the plaintiffs have, nevertheless, continued to proceed in this action, and that he in consequence advised with counsel as to what plea he should put in stating the above facts ; and also, that there had been no sealed release of J. B. Baby and Hall, which the defendant believed then to be the case : that he was advised he had no defence at law, because there was no release under seal, and that he could only seek relief in equity : that he

did, in consequence, file a bill in equity, to restrain further proceedings in this action; that the notice of assessment for the assizes in April, 1851, was given to him, and in order to save trouble and expense, he proposed to give a cognovit for 1000*l.*, with such defeazance as is attached to the one given by him on the 14th of April, 1851: that on the 19th of April, 1851, he had occasion to refer to Mr. Vidal, (attorney for J. B. Baby and Hall, to learn the exact nature of the arrangement between the plaintiffs and them, when he was told that he thought he had obtained a release from the plaintiffs, under the hand and seal of the warden of the united counties: that the first time he was satisfied or knew positively of the existence of the said release under the hand and seal of the warden, was on the 18th or 19th day of May last past, and that he has now ascertained the fact to be, that when the arrangement was made, Hall and J. B. Baby, both received releases under seal from the municipal corporation; but of this fact, he, this deponent, was entirely ignorant until after the execution of the said cognovit. This affidavit is sworn to 3rd June, 1851. A copy is annexed to this affidavit of the releases given to J. B. Baby and Hall. They are both in the same terms. That to the treasurer J. B. Baby, is as follows:—

“Know all men, that *I, Gerge Hyde, warden of the united counties of Essex, Kent, and Lambton, on behalf of the municipal corporation* of the said counties, in consideration of 1000*l.* to me on behalf of the said united counties well and truly paid by the said J. B. Baby, have remised, released and forever discharged, and by these presents do, for and on the part of the said municipal corporation, remise, release, and forever discharge, the said J. B. Baby, his heirs, &c., of and from all and all manner of actions, causes of actions, suits, debts, dues, sums of money, accounts, bonds, judgments, claims, and demands, whatsoever, in law and equity, which the said municipal corporation of the united counties of Essex, Kent, and Lambton, ever had, now have, or can, shall, or may have, for or by reason of any matter, cause or thing whatsoever, against him to the

date of these presents, save and except from claims, demands or action and judgment upon or on account of a certain cognovit, executed by the said J. B. Baby on the day of the date of these presents, confessing debt to the amount of 1000*l.*, payable on 1st of January, 1852, and which is the true consideration above mentioned,"

This release is dated 8th October, 1850, and professes to be executed by George Hyde, as warden as aforesaid, affixing the seal of the municipal council of the united counties of Essex, Kent, and Lambton.

The defendant's affidavit is supported by one of Mr. Vidal, stating that he was attorney for J. B. Baby and Hall, in the suits brought upon their bond; that as such he made a proposal to the plaintiffs on the 8th of October, 1850, that they should give their cognovits for 1000*l.*, each, payable on the 1st of January, 1852, without interest, upon the plaintiffs agreeing to release them from all claims they had against them, leaving the action against C. Baby to be proceeded with if they thought proper to do so; that C. Baby was in no way a party thereto; that on the 19th of April, 1851, he first informed C. Baby of the existence of a release under the hand and seal of *the warden (a)* of the united counties to J. B. Baby and Hall, and stated that if he (Vidal) had not yet received it, he was to get it from the attorney of the council.

And he further swears that he believes that the first time the said C. Baby *knew* of the (*existence of the said release in fact* was on the 18th or 19th day of May last, (1851.)

We find it impossible, on a view of all these proceedings, and the statements contained in the affidavits, to grant the application. In the first place, there is a question which is strictly a legal one, whether what is shewn as a release to J. B. Baby from the municipal corporation can be held to have any legal effect in discharging him from his bond. In the affidavits it is sometimes spoken of as being a release under the hand and seal of the warden; in others it is said to be under the seal of the corporation. In what is placed

(a) Pitman on Surety, 180; Smith et al. v. Winter, 4 M. & W. 454; May hew et al. v. Crickett et al. 2 Swans, 185.

before us as a copy of the instrument the seal of the corporation is said to be affixed. How the fact was, does not appear, but there seems to be no doubt that it is not the corporation who releases, but Mr. Hyde, the warden, on behalf of the corporation. And it is not shewn that either any by-law was passed authorizing the release, or any resolution come to by the council in session, and authenticated by their seal or otherwise.

The mere affidavit of the warden, stating in general terms that, by the authority of the council he negotiated, does not enable us to see that there is in fact any such release in existence as can discharge the bond.

But then, on the broad ground of merits, we are asked to take away from the plaintiffs the double proof they have of the debt—first, by the defendant's having deliberately and intentionally suffered judgment by default; and next by his having afterwards confessed judgment for the express purpose of rendering an assessment of damages unnecessary, and to throw it open to dispute their right to recover, by pleading that they have released his principal, and have therefore as a legal consequence, whether intending it or not, discharged him.

We ought not to do this, in order to give the defendant the means of placing himself in a position different from that in which it was intended he should stand when the arrangement in question was come to, if to place him in that position would be an unjust surprise upon the plaintiffs, and would have the effect of relieving him from a liability which he allowed them to suppose he would still abide by.

This is an application to the discretion of the court which ought always, as Lord Tenterden observed in *Davison v. Franklin*, (1 B. & Ad. 144,) to be exercised so as best to advance the ends of justice. Now, it would be stating the case perhaps too favorably for the side of the defendant, if we were to say that the papers before us make it at least doubtful whether we should be advancing the ends of justice if we should relieve him now from the judgment and confession, in order that he might set up the release to the

treasurer as a bar to a recovery against himself. I apprehend the inference would appear irresistible to any one who examines the proceedings and affidavits filed, that such an interference would have a most unjust operation.

The defendant does not deny that he was a party to the discussion when the first attempt at a compromise was made ; and, although it was proposed in the settlement that J. B. Baby and Hall were to be released on certain payments being made, and that the defendant was to contribute to those payments, he does not assert that he objected to being held liable at all, and for any amount, if his principal should be released ; and he does not deny, what is sworn on the other side, that that proposition only fell through because he objected to the amount which he was required to contribute as one of the obligors, and this by reason of the treasurer having proceeded against him on his other bond as security for Wood. Indeed, in his affidavits he admits this.

Then the defendant, though he swears that he was ignorant of the precise fact of J. B. Baby and Hall having received releases under seal until after he had executed the cognovit, does not swear, and I should think from Mr. Prince's affidavit, and other statements on the subject, he would not declare, that he did not so early as 9th October, and long before April, 1851, when he confessed judgment, well understand that the basis of the arrangement of the 8th October, 1850, was, that only a certain sum was to be exacted from each of his co-obligors, and another certain sum from himself, and that those payments, and nothing less were to acquit all. If he knew this, and did not object or remonstrate, but allowed the matter to be concluded on that footing, or acquiesced in it, though tacitly, after it was concluded, and gave the confession and took the defeasance shewing that the intention was that his co-obligors were to pay certain sums, and no more, and he to pay what the arbitrators decided and no more, and if he had reason to suppose that without his giving the confession the case must have gone on against him, we could not with any propriety interpose for the purpose of enabling him by the application

of a strict technical rule of law to defeat what he had deliberately agreed to.

We think that, considering the position in which the defendant stood in regard to J. B. Baby, and virtually to the counties, in consequence of his liability as surety for Wood, and on his own account for the same moneys of the district which were in question in all the suits, it would be most unreasonable that it should be in his power to avail himself of such defence as he desires to set up.

And it is plain, we think, that signing the cognovit under the circumstances, and at the time he did, and with the understanding to which he has attached his signature, he has confined himself to his chance of the remedy, whatever that may be, which he is seeking in a court of equity.

I do not apprehend that the court of equity, which has a concurrent jurisdiction in such matters, would find themselves disabled from enquiring whether this is a case for relief; and if we thought they might do so, we should still abstain from setting aside the judgment or confession.

If the defendant did not know that a sealed release had been executed, it was only because he did not inquire into the particulars of what had been done.

He knew that the agreement was to release them in effect on certain terms, and as soon as he inquired he learnt the further fact of the sealed release, which was but a natural consequence of the agreement, and which it was not pretended was intentionally concealed from him.

There are other points in the case which militate against the application, but which we think it unnecessary to enter into.

Rule discharged.

DOE PRINCE ET AL. V. GIRTY.

Misdirection—New trial—Possession how far prima facie evidence of seizin—Registry—Release inoperative for want of prior estate.

Where the court differed with the ruling of the learned judge at Nisi Prius on one point, but considered the verdict for the defendant well found on the other grounds, they granted a new trial at the option of the plaintiff, on his paying the costs by a certain day.

A. in 1842 conveyed to B's son, then a minor. This deed was never registered. B. swore that he bought the land from A., but being in difficulty, had the deed made to his son; that he had always continued in possession, but on this point

the evidence was contradictory. A's heir in 1849 made a deed of release to B., and B. conveyed to lessors of plaintiff—both these deeds were registered.

Held, 1st, that the mere fact of B. being in possession when he conveyed to the lessors of the plaintiff could not be relied on as *prima facie* evidence of seizin after A. had been shewn to have been in possession previously, and to have conveyed to B's son. *Held also*, that there being no evidence that the deed from A's heir to B. was for valuable consideration, B. could not displace his son by reason of the prior registry of that deed; and, for the same reason, the lessors of the plaintiff could not claim to be preferred. *But held also*, that the deed from A's heir to B. being a mere release, and (if B's son were in possession), there being no estate on which it could take effect, was inoperative.

Held also, that the production of the register's book in which a memorial is recorded, is good evidence of the title being a registered title.

And *semble*, that the register producing an examined copy taken from his book, without bringing into court either his book or the memorial would be good evidence.

Ejectment for south-east part of 20 in 4th concession of Gosfield, 66 acres.

The plaintiffs claimed under an indenture of bargain and sale made 27th November, 1850, by Prideaux Girty to them, reciting that Henry Wright, son and heir of William Wright, had, on 29th September, 1849, granted, remised, released, and forever quitted claim unto the said Prideaux Girty, his heirs and assigns, all his right, title and estate in and to the premises, and by that indenture Prideaux Girty grants, bargains, sells, releases and confirms to the lessors of the plaintiffs the premises now in question in fee, describing them as being then in the occupation of the said Prideaux Girty and his family, or his tenants, the consideration expressed being 300*l*. The plaintiff gave no evidence of Prideaux Girty's title, but replied on evidence that he was in possession when he made this deed.

Prideaux Girty was examined as a witness on the trial and stated that his title was under a deed which was produced and proved on the trial, being the deed poll recited in the deed to the lessors of the plaintiff. It was a deed poll, whereby Henry Wright, describing himself as eldest son and heir-at-law of William Wright deceased, in consideration of five shillings to him paid by Prideaux Girty, granted, remised and released, and forever quitted claim to Prideaux Girty, his heirs and assigns, *all his right, title, interest and estate in the south-east part of lot No. 20, in the 4th concession of Gosfield, containing 66 acres more or less, to hold the above granted premises, with all his right, title, interest*

and estate in and to the privileges and appurtenances to the said land and tenements belonging to the said Prideaux Girty in fee.

The grantor, for himself, his heirs, executors and administrators, covenanted that he would warrant and defend the same to the said Prideaux Girty, his heirs, &c., against the lawful claims of all persons claiming by, through or under him or them, and none other.

His wife joined in this conveyance and barred her dower.

This deed was registered 23rd September, 1850. The deed to the lessor of the plaintiff was registered 28th November, 1850.

It was proved however that on 18th June, 1842, a deed of bargain and sale had been executed by William Wright, then living, by which he conveyed this land in fee to Simon Peter Girty. This deed was unregistered. Prideaux Girty swore upon his cross-examination that that deed was made at his instance at the time of its date; that he bought the land from William Wright, but being in difficulty had the deed made to his son (the now defendant,) without the son's knowledge, who was then a minor, and that he never delivered it to the defendant.

He swore that he went into possession of the land in 1842, and had constantly lived on it with his family till 27th November, 1850, when he conveyed it to the lessors of the plaintiff. But upon the point of possession there was some inconsistent evidence as to the defendant being in possession on his own account and leasing to another; the apparent inconsistency probably arising from Prideaux Girty wishing at times to allow it to be thought that the beneficial interest was in Peter, as the formal title apparently was by the deed of 18th June, 1842, which he had himself procured to be made to him.

When this latter deed was produced, the plaintiff's counsel endeavored to rest his case still on evidence of Prideaux Girty's being in possession when he made the deed to the lessors of the plaintiff; but the learned judge (Sullivan) ruled that it being shewn that Wm. Wright was admitted by Prideaux Girty to have been seized, either his

deed of the 18th June, 1842, conveyed the estate to the defendant, or the plaintiff must continue seized ; and that the deed to the defendant could not be treated as enuring to the benefit of Prideaux Girty.

The plaintiff then endeavored to sustain his case by relying on the deed poll from Henry Wright of 29th September, 1849.

But the defendant's counsel insisted that Henry Wright's deed could not pass any estate, because he was not himself then in possession, but another person, claiming under the deed made in 1842 by his father.

The learned judge considered that Prideaux Girty, being in possession on 27th November, 1850, might then legally take a deed from any one to confirm his title.

Then it was objected that the deed of 29th September, 1849, being resistered, was entitled to priority over the unregistered deed to the defendant of 18th June, 1842 ; and to prove that the title was a registered title before 18th June, 1842, was to impose on the person taking under that deed the necessity to register at his peril. The deputy registrar was called, who produced the memorial of a deed dated 2nd August, 1841, from Henry Laughton to William Wright, on which was noted that it was registered on 4th August, 1841. He swore that this memorial was filed and registered.

It was objected that it was necessary to produce and prove this deed of 2nd August, 1841, or to account for its non-production, and prove its execution. The learned judge ruled so, and that the register's book would not help, and on that ground directed a verdict for the defendant.

A. Prince moved for a new trial on the law and evidence and for misdirection, and the rejection of proper evidence, citing (besides the cases referred to in the judgment of the court) *Doe Bothell v. Martyr* (a).

J. Wilson shewed cause. The points taken by counsel are all noticed in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

Upon the question whether the fact of the title being a

registered title before the deed of 18th June, 1842, was made was sufficiently proved at the trial: we do not apprehend that there can be any doubt that the production of the register's book is all that need be shewn for that purpose—Doe dem. Brennan v. O'Neill (a); and I think that production of the memorial and proof of a transcript of it being recorded in the proper book is all that can be necessary. I assume also that the registrar producing an examined copy taken from his book without bringing into court either his book, or the memorial, which are public archives, not to be removed without necessity, would be equally admissible. The learned judge held that the deed which is alleged to have been recorded must be produced and proved; but this has not in any case, so far as we know, been held to be necessary, and we do not think that on principle it should be. The jury therefore, we think, were not rightly directed on that ground; but it appears to us that the learned judge was right in considering that on other grounds also the plaintiffs did not support their case.

They could not rest on their mere possession as *prima facie* evidence of seizin, after they had shewn Wright seized in 1842, and a conveyance from him to this defendant. They had then to overcome this evidence of title in Peter Girty, and they rested on the deed made to Prideaux Girty by Henry Wright, the son, on 29th September, 1849, and contended that that should prevail over the prior deed to Peter Girty, because it was registered, and the other not; but could it be said that Prideaux Girty, taking a deed under such circumstances, appeared upon the evidence to be a *bona fide* purchaser for value, entitled to be preferred to the defendant under the Registry Act? He does not shew that any consideration whatever passed from him as a purchaser since he himself took the deed of 1842 to his son, the defendant, from Henry Wright's ancestor, which deed his assignee now seeks to set aside as fraudulent and void. How could we recognize Prideaux Girty as a person who has *bona fide* purchased the estate for value since that deed was made, and entitled on that ground to prevail against it,

to the prejudice, for all we can tell, of the defendant, or of some person who may have dealt with him, or trusted him as the owner, and who was enabled to do so by the witness's own act in taking that deed. He withholds this deed from registry, which he swears he had taken to serve some purposes of his own, and then would be claiming to treat it as fraudulent and void as against himself because it has not been registered.

In *Doe dem. Cronk et al. v. Smith (a)*, we held that it forms a necessary part of the proof in every case, when the person taking the subsequent conveyance seeks to avail himself of the Registry Act, that he should shew himself to have been a purchaser for value, which must surely mean upon a transaction, and for a consideration, distinct from, and independent of the transaction in the first deed, but the very contrary was shewn here. And this is independent of the objection that the deed to Prideaux Girty was a mere release for a nominal consideration, and that there was no previous estate for it to operate upon. Upon that point we must consider, that if this defendant, the grantee in that deed, was in possession when that deed was made, then there really was nothing for the release to act upon, for his possession would be referred to his own title, and at any rate, unless Prideaux Girty was actually in possession then, the objection must prevail. The evidence on the point of possession is not quite clear, but on the ground that the deed to this defendant divested the title from William Wright, the father, and that upon the evidence of Prideaux Girty his deed was not entitled to prevail under the Registry Act over this prior deed, we think the verdict for the defendant was proper.

It is objected on the plaintiffs' side that whatever may be the fact or the defect of proof in regard to Prideaux Girty being a *bona fide* purchaser for value, still they, the plaintiffs, are such purchasers from him, and that so, as between them and the defendant, the unregistered deed must be held to be fraudulent and void under the second clause of the Registry Act. Assuming this to be so by analogy with

what has been repeatedly held under the statute against fraudulent conveyances to defeat creditors, and indeed under the very words of the Registry Act, which says that the unregistered shall be held fraudulent and void as against any *bona fide* purchaser for value, not only as against the person taken immediately by the deed, which is to gain priority by registry, still the difficulty remains, that no evidence whatever appears to have been given of value given by the lessors of the plaintiff, any more than by Prideaux Girty. Something was said of this deed being a mortgage: it is an absolute conveyance in form; but no evidence was given of what the actual consideration was, or whether there was any.

There are some points in this case which make it resemble a peculiar case in this court, of Doe dem. Major v. Reynolds (*a*), to which it is material to refer.

Upon the evidence, the plaintiffs did not, in our opinion, entitle themselves to recover; but, as we do not concur in the ruling on which the verdict for the defendant was directed, though we think the plaintiffs not entitled to recover on what was proved, and as the facts of the case have not been fully elicited, we grant a new trial if the plaintiffs desire it, on payment of costs within one month, otherwise this rule to be discharged.

DOE DEM. HENDERSON V. SEYMOUR ET AL.

Trespassers on Crown Lands—Ejectment by vendee of Crown—Agent's receipt for Land—Power of Government to cancel their contract with vendee after receipt—3 & 4 Vic. ch. 78, sec. 31; 4 & 5 Vic. ch. 100, sec 18; 12 Vic. ch. 31 secs. 2, 3.

The plaintiff in 1846 purchased some Clergy Reserve Land from a government agent, and obtained from him receipts for partial payment. The defendants were then living on the land, and had been living there since 1840, having made valuable improvements. On the 2nd August, 1849, an order of council was made, that on defendants making the required payments, plaintiff's money should be returned to him, and the sale to him cancelled. When the present action was brought, an order of the Executive Council was made 6th August, 1850, recommending that the Attorney General be authorized to defend the suit, *Held*, that at the time plaintiff received his first receipt from the government agent, defendants being mere intruders on Crown Lands, he acquired a right to eject them under 12 Vic. ch. 31, sec. 2, and that the Crown could not at its pleasure divest him of that right, nor change a wrongful occupant into a rightful occupant, to the prejudice of their own vendee.

Ejectment for E. $\frac{1}{2}$ of 27 in 3rd concession North of Egremont road in Warwick.

DOE DEM. HENDERSON V. WESTOVER.

Ejectment for W. $\frac{1}{2}$ of 25 in 4th concession North of Egremont road in Warwick.

DOE DEM. HENDERSON V. MCCORMICK.

Ejectment for W. $\frac{1}{2}$ of 27 in 3rd concession North of Egremont road in Warwick.

The case against Seymour was first tried. The plaintiff put in a receipt signed by Patrick McMullen, as crown land agent, dated at the Western District agency, Sandwich, December 7th, 1846, for 28*l.* 10*s.* currency, received from the lessor of the plaintiff, being for the first instalments, "including the inspection fees, on the following clergy lots in the township of Warwick—viz., No. 27 in 3rd concession North of Egremont road, and No. 25 in 4th concession North of Egremont road, and No. 27 in 2nd concession South of Egremont road." He produced also a receipt signed by the same crown lands agent, dated Western District Agency, Sandwich, 4th December, 1847, as follows—"Received from James Henderson, Esq., (lessor of plaintiff,) a draft on George Thomas, Esq., agent Upper Canada Bank, Chatham, for the sum of 25*l.* 8*s.* 10*d.* to be applied to the payment of the second instalment" on the same lots as are specified in the first receipt.

This was the plaintiff's case, the receipts being relied on as sufficient evidence of title under our statute 4 & 5 Vic. ch. 100, sec. 18, which by a subsequent act has been made to comprehend the case of vendees of clergy reserves.

For the defendant there was put in, 1st, an order in council, made 2nd August, 1849, approved of by His Excellency the Governor General, in which it was recited that Robert Seymour, Samuel McCormick, Richard Burdett, and Eleazar Smith, of Warwick, had petitioned to be confirmed in the possession of Clergy Reserve Lots No. 27 in the 3rd concession, and 25, in 4th concession North of the Egremont road in Warwick, the said lots having been in their occupation during a number of years, with buildings and

other improvements ; that their application had been opposed by Mr. James Henderson (the lessor of the plaintiff,) on the ground that the lots in question were sold to him by the district agent in December, 1846, and that he declined relinquishing his right thereto : that the opinion of the Solicitor General had been taken thereon, who had reported that he had considered the petition and papers, and was of opinion that the evidence established the occupation of the lands in question by the petitioners, and the existence of considerable improvements at the time of the sale to Henderson : that notification of such occupation and improvement had been made to the agent of government, whose conduct, viewed in the most favorable light, had been culpably negligent : that the injustice to the occupants by depriving them of their improvements would be so great, and bear so hardly on so many families, that he thought the option to purchase should be offered to the occupants, and that on their making the required payments, Mr. Henderson's purchase money should be repaid, and the sale to him cancelled.

The council recommended that the opinion of the Solicitor General should be approved and adopted, and an order of the Governor General in council was made accordingly, 2nd August, 1849.

There was also put in an order of the Executive Council, made 6th August, 1850, on the petition of Robert Seymour, Richard Burdett, and Erastus Westover, (Seymour and Westover being the defendants in two of these ejectments), stating themselves to have purchased under the order in council of 2nd August, 1849, and representing that two of them had been served with writs of ejectment at the suit of James Henderson, Esq., on the plea of his prior purchase, and the council recommended that the Attorney General should be authorized to defend the suits.

The defendant also put in a receipt dated 27th December, 1849, signed by the crown land agent, Mr. McMullen, acknowledging the payment of 14*l.* 15*s.* 0*d.* for two instalments, rent, &c., on east half of lot 27 in 3rd concession north of Egremont road in Warwick. This receipt is in fact a

letter from the agent to Seymour, in which he also recommends him to arrange this matter with Mr. Henderson.

The learned judge (Sullivan,) rejected evidence offered by the defendant that he had been in possession of the land since 1840, and had built a house on it, and that he offered to purchase before the sale to Henderson, not thinking such evidence material.

It was objected by the plaintiff's counsel that what was shewn could not prejudice the plaintiff's right under his purchase made in 1846. The learned judge directed a verdict for defendant, reserving leave to enter verdict for the plaintiff, if this court should be of opinion that under the facts shewn, the defendant could be treated by the plaintiff as a trespasser under the 18th clause of 4 & 5 Vic. ch. 100, being in with the assent of the Crown, and whether such assent, not under the great seal, is sufficiently shewn under the orders in council.

The same evidence and same questions apply in the three cases, and in each case a verdict was found for the defendants.

Galt obtained a rule nisi to enter a verdict for the plaintiff, or for a new trial, on the law and evidence, and for the reception of improper evidence, contending that the defendants were wrongful occupants, and not in privity with the Crown at the time the plaintiff received his first receipt from the government agent, by which his right to eject instantly accrued (*a*), and which no subsequent act of the government divested, and as they were not shewn to have been in possession in 1836 they were not protected by the statute (*b*).

Richards for Westover and Seymour, and *J. Wilson* for McCormick, shewed cause. They contended that government had a right to cancel the sale with plaintiff; also, that as government defended this action, in effect the action was against the Crown, and that the statutes (*c*) could not apply to the Crown and overrule its acts. Those statutes only apply to wrongful occupants, which, as the

(*a*) 12 Vic. ch. 31, sec. 2.

(*b*) 3 & 4 Vic. ch. 78 sec. 31.

(*c*) 4 & 5 Vic. ch. 100 12 Vic. ch. 31.

government desired to maintain their possession, they cannot be considered; and that as against the Crown the receipt plaintiff had received could not operate as a patent.

ROBINSON, C. J., delivered the judgment of the court.

These cases all turn upon the question whether the lessor of the plaintiff can avail himself of the 18th clause of the 4 & 5. ch. 100, and can maintain ejectment upon his contract of purchase and receipt for instalments against the defendants.

It is contended that he cannot, because the government before he brought his action (not before he made his purchase) had shewn a willingness to recognize the defendants as being occupants entitled to pre-emption, and a disposition to protect them and to cancel their sale to the lessor of the plaintiff. This brings up a question of some nicety which we can only decide on reason and principle, without expecting to find aid from any case in point, because the state of things created by our statute is peculiar to this country. The Land Sale Act, 4 & 5 Vic. ch. 100, sec. 18, provides that when a purchaser of Crown lands has bought land from a district agent, he shall make his payments to the district agent, who, upon the receipt of any purchase money, shall give the purchaser a receipt in a certain form, which in these cases has been complied with; and that such receipt shall authorize the purchaser to take immediate possession of the lot so sold, and to maintain actions or suits in law or equity *against any wrongful possessor or trespasser on such land*, as fully and effectually as if the patent deed had issued on the day of the date of such receipt.

This provision has, by an act passed subsequently, been extended to the case of clergy reserves sold by the government.

Can the lessor of the plaintiff make use of the privilege of this clause against any of these defendants, considering the circumstances under which they stand? If he can, then he is clearly entitled to succeed, otherwise not, for he has had no previous possession to rely upon, and holds only his receipt, which however, is equivalent to a patent, if he

is at liberty to treat the defendants as wrongful possessors or trespassers.

It is clear, and has been so held in this court in several cases (a), that an intruder upon the lands of the Crown gains no seizin or privilege by his possession; that he continues a mere trespasser after the Crown has granted the land to another, as well as before, and may be proceeded against as such by the patentee, whose estate is complete without entry, notwithstanding such tortious holding by the intruder. In Bacon's Abridgment, Prerogative E. 6, the law in such cases is thus stated by Chief Baron Gilbert, "So there can be no tenant at sufferance against the King, but he who holdeth over is an intruder, because no laches can be imputed to the King for not entering. Therefore if the King be seized in fee of the manor of B., and a stranger erect a shop in a vacant plot of it, and take the profit of it without paying any rent to the King, and after the King grant over the manor in fee, and the stranger continue in the shop and occupy it as before, this is no disseizin, but an intrusion on the King's possession, for that the King's title appears on record, and the entry *in pais*, which is not an act of equal notoriety, will not divest it out of him. If then the King is not disseized, his conveyance of the freehold is good, and the grantee is seized by virtue of it, and consequently cannot be said to be disseized by the stranger who has made no entry on him after the King's conveyance, but only continued the old interest which he had before the grant, and so remains an intruder still, and liable to an action of trespass or ejectment for it."

It is not shewn, and I think is not asserted, that either of these defendants entered under any claim of right, or by any privity with the Crown, or that they were anything but mere intruders up to the time of the sale to the lessor of the plaintiff, when the district agent, on behalf of the government, made that contract with him and gave him that receipt, which the statute says shall give him the same right to maintain actions against any wrongful possessor as the King's patent could do.

(a) Doe Fitzgerald et al. v. Finn, 1 U. C. R. 81, 82.

There is nothing in the case to shew that the defendant in each case was not a *wrongful possessor* on the 7th December, 1846, when the lessor of the plaintiff paid the first instalment on his purchase, and took his receipt, or that he was anything more than what is familiarly called a squatter. If we are right in assuming that to be so, then, in my opinion, he was a *wrongful possessor*, whom the purchaser had acquired the right and power under the statute to eject.

It is true that the government *afterwards*, in 1850, upon a petition preferred to them by the defendants, manifested a disposition then to protect them, and to annul the sale; in other words, to revoke what the statute had as against wrongful possessors made equivalent to a patent. It is not shewn that this was by reason of any prior contract that had been made with the defendants, and that had been unfortunately overlooked, or because their possession had been in any manner authorized or recognized at any time by the government, but only because, entering for all that appears without right, they had been in occupation for several years, and had made large improvements. As between individuals this would make them not the less wrongful possessors and trespassers; and in contemplation of law, they must be at least as much so as regards the Crown. It has, I confess, the appearance of being a perversion of sound principle, and detrimental to morality, to afford to wilful trespassers the privilege of a pre-emption right by reason of their illegal occupation. It would have been better, perhaps, if it had been always a maxim that a mere intruder, instead of being the person who should in preference to all others be allowed to acquire a title, had been always made to understand that a grant would be made to anyone rather than to him. But, from considerations which were thought to justify it, the opposite policy of favoring these intruders has been generally, I believe, the policy of the government in this province for a long time, if not from the first.

Here, however, it comes in conflict with what the statute law has made a legal right. I think there is nothing whatever before us to shew that the intention to sell to these

particular occupants, and the assent to their occupation, were not both after the 7th December, 1846, when the receipt was given to the lessor of the plaintiff; and the Crown could not, in my opinion, at its pleasure divest the right which it had granted, and not as an act of bounty, but for a valuable consideration.

The government has not a discretion to change a wrongful occupant into a rightful occupant to the prejudice of their own vendee. If up to the time of the sale to Henderson the Crown had not authorized the occupation of the defendants, then they were in fact wrongful possessors; and continuing so up to and after the time of the date of the receipt, we see no legal principle on which we can hold them not liable to be treated as such by the *bonâ fide* purchaser. We are not determining what the Crown may or may not have it in its power to do for cancelling its contract with Henderson, and putting an end to its legal effect as regards his rights, and the rights of others; but, as the matters stand, we consider that we cannot deny the plaintiff's right to recover against these defendants on producing his receipt, and in the absence of fraud.

The argument on the other side is, that the government, being now willing to protect the possession of the defendants against the consequences of their own sale to Henderson, they are no longer trespassers or wrongful occupants within the intention of the act, and that Henderson must be looked upon now as using his receipt against the government rather than against "wrongful possessors," since the government has taken upon itself the defence of these ejectments. We cannot say that any such legal consequences can be deduced from the mere fact of the willingness of the government in 1849 to maintain them in possession. The holder of receipts upon the Crown sales has, under the statute, acquired legal rights which it would be dangerous to disregard, and which, we think, we have no authority to disregard; for we cannot tell what interests and arrangements may in such cases have been acquired under the receipts in which the public are entitled to place confidence, at least when they have not been obtained by

any fraud. Inconveniences and injury, on the other hand, may follow from the statutes 4 & 5 Vic. ch. 100, sec. 18, and 12 Vic. ch. 31, secs. 2 and 3, if the discretion of the Crown in dealing with inchoate rights to public lands is held to be thus diminished; but we cannot legislate in order to guard against such inconveniences.

The statutes have, to a considerable extent, interfered with the control which might always have been exercised before, so long as the patent had not been granted. Whether such enactments are on the whole prudent and beneficial, or otherwise, as they stand, is to be considered elsewhere. There can be no other question in these cases, except this—whether the assent of the government in 1849 to allow these defendants to continue in possession, and their order in council cancelling the sale, disables the former purchaser, who has paid his money, from treating them as trespassers and wrongful occupants.

If he had paid all his purchase money and obtained his patent, he could undoubtedly treat them as trespassers; for they have no right acquired before his which they could set up against him; then, if he cannot eject them upon his receipt, he cannot “maintain his suit against the person who undoubtedly is as to him a wrongful possessor as fully and effectually as if he had his patent.”

It might have been well if the act had contained a provision reserving to the government a right of control until the patent should issue, by providing that in case they should at any time before the patent should issue recognize the possession of any person to be rightful, it should not be competent to their vendee to treat such person as a trespasser under the statute, but we do not think there is any such reservation implied.

So far as the regulations which have been made by orders in council respecting the sale of clergy reserves bear on these cases, they do not make in favor of the defendants; for they shew that the government do not by their rules contemplate the confirming any possession which was originally taken without authority, unless it had been held five years before the 1st January, 1841, or unless such occu-

pant should apply to be allowed to purchase before the 1st January, 1847. The case is required to come within both of these conditions, and these cases before us come within neither, according to the evidence.

I have felt that the question, now for the first time brought up, required to be carefully considered on several accounts. The late statute, 15 Vic. ch. 31, sec. 3, extends the privilege of maintaining actions before patents issue to the holders of location tickets or licenses of occupation; but the legislature there were careful to reserve to the Crown a proper control over the grant, for they only give to the holders of such tickets or licenses this right, "*so long as the said location ticket, or license of occupation, be not revoked by an order in council.*" By making no such reservation in regard to vouchers granted upon sales, they seem to have considered that the government should not have a right at their pleasure to undo a sale by an order in council any more than an individual can. It seems to have been intended that in such cases where there has been any thing wrong, which should vitiate the contract, the Crown should be left to its legal remedies for annulling it. And this would seem reasonable, because if a purchaser, after paying one or two instalments, is exposed to the chance of having his purchase annulled, and the land sold to another merely because the government is willing to overlook what was really an act of trespass and to recognize a claim to indulgence which it was not bound to recognize, the same thing might be done after he had paid his ten instalments, and had involved himself in a liability to others, relying on his title being confirmed.

No doubt the government in these cases before us were displeased that their agent had been inattentive, as it seemed, to the fact, which he might or ought to have known, of the possession held by these defendants; and though it does not appear from what is before us that he could have known anything which would have shewn him that his sale of the lands to the lessor of the plaintiff was wrong in itself, or contrary to the regulations of the government, yet they were willing to save the defendants from the hardship of

losing their improvements, though illegally made—but I think that nothing which they did with this view could annul the effect given by the statute to their receipt held by the vendee as evidence of his title.

And my opinion is, therefore, that in each case the verdict should be entered for the plaintiff.

DRAPER, J.—The 4 & 5 Vic. ch. 100, sec. 18, provides that the local agent for the commissioner of crown lands should give receipts to purchasers, specifying the number of the lot, or the land purchased; “and such receipt shall bear date on the day on which it is actually signed, and shall authorize the purchaser to take immediate possession of the lot so sold; and to maintain actions and suits in law or equity against any wrongful possessor or trespasser on such land as fully and effectually as if the patent deed had issued on the day of the date of such receipt.”

This statute however extends only to the sale of crown lands; not to clergy reserves.

The imperial statute 3rd & 4th Vic. ch. 78, sec. 1, authorizes the Governor of Canada, by and with the advice of his Executive Council, and under such regulations as might be by him from time to time in council established in that behalf, and approved by the Queen in council to sell, grant, alienate, and convey in fee simple all or any of the clergy reserves.

Under this act the Governor, with the advice of the Executive Council, made certain regulations, which, on the 21st October 1841, and the 10th December, 1842, were approved by the Queen in council; by which the commissioner of crown lands was appointed to act in the sale of clergy reserves. The 4th regulation provided for the inspection of the reserves to be returned upon oath, such returns to shew whether the reserves were occupied, improved, or vacant; and if occupied or improved, by whom, or under what authority or claim, if any be asserted—the extent, nature, and value of the improvements; the value of the land apart from such improvements, the nature of the soil, and such other circumstances as may affect the valuation. By the 5th the Governor in council was authorized to

approve, alter, or annul such returns. The 6th, provided that parties considering themselves aggrieved by the returns might have their cases considered, on petition to the Governor in council. The 7th was, "That upon the confirmation of any such return, the same shall be communicated to the commissioner of crown lands, and the land contained in each return shall be *considered open for sale*, at the price stated in such return, as confirmed, *including the value of the improvements*, to the first person who shall apply for and pay the same." The 9th was, that where any reserves shall be offered for sale which have been leased or where any reserves offered for sale shall have been improved without authority, for the space of five years next before the 1st January, 1841, the agent for the sale shall allow privilege of preëmption to the lessees or their assignees, "in case there shall have been no lease to occupants for the space of twelve calendar months after such land shall have been offered for sale. And in case of any sales to such lessees or occupants, interest on the purchase money at the rate of six per cent. per annum shall be added thereto from the time the lease expired, or if no lease, from the time of such occupation, as the same may be reported by the inspectors; and the value of improvements made upon such lands shall not be charged as part of the purchase money. No. 10, provides for the payment of the purchase money—two-sixths down, the residue in four equal annual instalments, with interest; the first instalment to become due on first of January next after such sale. Any purchaser to anticipate the time of payment. By the 11th, the agents of the commissioner of crown lands are to effect sales and receive moneys. By the 13th, on production of the agent's receipts at the principal office, the amount shall be credited on the purchase; and on payment in full the commissioner shall certify the same, and letters patent shall issue to the purchaser. A notice was given in the Gazette of 31st January, 1846, that the disposable clergy reserves in the Western district would be open for sale on and after the 10th March, 1846, on application to the resident agent, Patrick McMullen, Esq.; and the above regulations Nos. 9 and 10, were appended to that notice.

On the 14th March, 1846, notice was given that by a recent order in council the following alterations had been made in the sale of the reserves: 1st. One-tenth of the purchase money in hand, the remainder in nine equal annual instalments, payable as before, on the 1st of January. 2nd. On lots occupied without authority, in place of interest as required by the late regulation, rents to be charged at fixed rates given. 3rd. The privilege of pre-emption granted by late regulations to lessees and their assignees whose leases expired previous to the 1st January, 1841, as also to occupants without authority prior to the same date, shall not be considered to extend to such lessees or their assigns, or to *such occupants as do not on or before the 1st January, 1847, make application to the crown land commissioner for the purchase of the clergy lots which they respectively occupy, and who do not on or before that day pay all rents which may be due according to the present regulations.*

On the 8th April, 1846, sale of clergy reserves in Upper Canada were suspended "for the present;" and I do not find public notice of its being resumed.

The provincial statute 12 Vic. ch. 31, sec. 2, extends the 18th section of 4 & 5 Vic. ch. 100, and declares that said section shall be deemed at all times to have extended to sales of clergy reserves, crown reserves, school lands, &c., &c. The language of the third section tends strongly to shew in what case the Governor in council could exercise a power of revocation.

It did not appear that the present defendant, though an occupant, as was stated in the agreement in 1841, was so for five years next before the 1st January, 1841, so as to acquire a right of preëmption under the 9th regulation; nor did it appear that he was entitled to the protection of regulation No. 3 of 14th March, 1846, for he made no application before the 1st January, 1847, for purchase; nor is it asserted that he, on or before that day, did pay the rents due, according to the regulations, for his past occupation.

On the other hand, we must, I think, assume that an inspection took place under No 4 of the 1st set of regulations;

that the return was approved under the 5th of these regulations, and was communicated to the commissioner of crown lands, according to the 7th of the same regulations; under which, if so, the land would be open for sale. And as under regulation No. 11, the agent had power to sell and give receipts, the lessor of the plaintiff, at the date of his purchase and payment of his first instalment, became the purchaser under the imperial statute, and the regulations made in conformity therewith, and under the provincial statutes 12 Vic. and 4th & 5th Vic. entitled to immediate possession, and to maintain actions and suits against any wrongful possessor or trespasser on such land, as if he had a patent deed.

Then, is defendant a wrongful possessor or trespasser? I cannot presume that he was not when the agent sold the lot to the lessor of the plaintiff, and received the first and second instalments of the purchase money.

I cannot bring myself to the conclusion, that after such a sale, and under the facts established, the defendant is not a trespasser as against the lessor of the plaintiff by reason of the order in council. The sale made under the statute, and the regulations made under its authority, and therefore *quasi* part of the statute, giving a title as against any person in possession who can shew no title of earlier date, or at least bring himself within those provisions and exceptions of the regulations which would shew he was not a wrongful possessor: and I do not think an order in council can either revoke the statutory effect of the receipt, or give a new and different character to the occupation.

BURNS, J.—The statute 4 & 5 Vic. ch. 100, sec. 18, enables the vendee of the crown to maintain an action of ejectment against any wrongful possession of a trespasser upon such lands as the crown, through his agent, may sell; and the provisions of this statute being extended by 12 Vic. ch. 31 to the clergy lands, and the land in question in this action having been sold under the provisions of the 3 & 4 Vic. ch. 78, regulating the disposal of the clergy lands, two questions present themselves for determination—first, whether on the 7th December, 1846, the date of the sale to

Mr. Henderson, the defendant was in the wrongful possession of the land : and secondly, if he were, whether the Executive Council could by order in council cancel the sale to Mr. Henderson, and authorize a sale to the defendant ; or whether an order in council could confer a right upon the defendant to successfully resist the plaintiff's action.

It is not shewn that the defendant did, or that in fact he could, claim the provisions of 3 & 4 Vic. ch. 78, as operating in his favor; on the contrary, he had no right of preëmption, and therefore the land was to be sold to any one who chose to become the purchaser. The defendant has no cause of complaint that he was deceived in any way —his complaint must lie against himself, that he went upon the land trusting to chances in his favor, or that he was negligent of his own interest. If he had any equitable cause for his claim, he was certainly liable to be ejected by the crown at any moment ; and in this position, without any expressed desire on his part to become the purchaser, for anything we see to contrary, the Crown sold to Mr. Henderson, who appears not to have known the land was occupied in any way Mr Henderson paid the instalment of his purchase, and took the agent's receipt ; and from that moment the act of parliament began to operate in his favor, and conferred upon him certain privileges. On the facts proved it is impossible to hold otherwise than that the defendant was a wrongful possessor of the land at the time of the sale, and that Mr. Henderson then was by virtue of the act entitled to the immediate possession ; and if there were nothing else in the case, there could be no room for argument.

The next question is, whether there has occurred anything since, which displaces the rights Mr. Henderson so acquired by virtue of the act of parliament. The defendant petitioned the Executive Council, in 1849, on the subject, to be confirmed in the possession of the land, and upon the report of the Solicitor General the Council on the 1st August, 1849, authorized that the option of purchase should be offered to the defendant, and that if he made the required payments, then that Mr. Henderson's purchase money

should be returned to him. It appears the defendant availed himself of this ; but Mr. Henderson's money was not returned to him. No complaint is made against Mr. Henderson in any way ; but the Council were guided by the Solicitor General's report, which says, that the agent's conduct was most culpable, viewed in its most favorable light as respects the defendant. After the lessor brought his ejectment, the council directed by order that the Attorney General should be instructed to defend. Nothing is said in the order of council about cancelling the sale to Mr. Henderson ; but is it to be looked upon, if valid in any way, that a compliance by the defendant with the terms that the fact of such compliance virtually cancels the sale to Mr. Henderson ? Suppose the defendant had never complied with the terms, was the sale to Mr. Henderson then to stand good ? Were the rights which the statute conferred upon him, subject to be divested upon the defendant complying with the terms of the order in council ? These questions suggest themselves upon the idea that the order in council was intended to confer a new right upon the defendant not that a right existed which the council only intended to recognize ; for it is not pretended that the defendant had any rights which rendered the sale to Mr. Henderson illegal in any way ; and therefore the order in council can have, and in fact has, no reference back to any thing beyond the 7th December, 1846, which would or could prevent the operation of the act of parliament in Mr. Henderson's favor. It was recommended, and the order in council is, that upon the defendant making the required payments, in case he exercised the option of purchase, Mr. Henderson's purchase money should be returned to him. It is clear that the sale then to Mr Henderson was but conditionally revoked, and that he became vested with all the rights conferred by the act of parliament in the mean time. Whether, since the statute, the crown can conditionally or otherwise revoke a sale once made, is not the question to be decided in this action : that may be contested by the crown taking proceedings to dispossess the vendee under the contract ; but the true question here is

whether the crown can clothe an occupant with an authority to resist a right conferred by an act of parliament. The defendant has claimed before the council an equitable right, which right the crown endeavours to sustain by stating that upon the occupant complying with certain terms a sale shall be made to him, and that the Attorney General be instructed to defend the action. Now, if the government could sell to the defendant after selling to Mr. Henderson, of course the sale could have equally been made to any other person; and I see no reason for arguing that the second vendee would be clothed with any of the rights conferred by the statute—most certainly not as against the first vendee. Then, in what other situation does the defendant stand here? He is the second vendee, because it is said there are equitable circumstances in his favor. Can the crown, if it cannot confer a right upon a second vendee, to dispossess a first vendee, confer a right to resist an action which is given by act of parliament? The order in council must be reduced to this effect, for it can have no other, as it seems to me, and then the question is simply this—whether the crown, notwithstanding the provisions of the act of parliament, retains a power to authorize an occupant to resist an action. If the patent had actually issued at the payment of the money instead of the receipt, the case would never have been argued; and what difference can there be when the statute says the purchaser may bring his ejectment as fully and effectually as if the patent deed had issued on the day of the date of the receipt.

Whatever right the crown may have to avoid the contract entered into with Mr. Henderson, or to resist the performance and fulfilment of it with him; it is perfectly clear to me that to hold that the crown could, either from equitable circumstances connected with the occupant of the land, or from the culpable negligence of their officers, in which the purchaser did not in any way participate, or was necessary to, authorize the resistance of legal or equitable proceedings by those who at the date of the sale were in wrongful possession, would be subversive of the act of parliament.

I think the defendant was a wrongful possessor of the

lands in question ; and that nothing has occurred since the purchase by the lessor of the plaintiff which prevents him from maintaining the action of ejectment against the defendant.

Per Cur.—Postea to plaintiff.

BROWNE ET AL. V. G. S. BOULTON.

Promissory note—Due diligence in presentment to makers.

The plaintiffs sued on a promissory note made by one Clarke, payable at no particular place, and indorsed by defendant. The note was left at the bank in Cobourg, where the maker then resided, for collection ; and the clerk who was to present it being examined, stated that before the note became due he heard that the maker had left Cobourg ; that on its becoming due he went to the house in which Clarke had formerly resided, and found only a woman, who could give him no information respecting Clarke. He made enquiries of more than one person who had known Clarke well, but their answers, as to where Clarke had gone, were conflicting. Witnesses were called for the defence, of whom Clarke's partner was one, who stated that no secret was made of his intended departure, that his furniture was advertised, and that they could at any time have given correct information as to his place of residence.

Held per Cur., that at least application should have been made to the places to which Clarke was said to have gone, and that due diligence had not been used to discover his residence ; the question being whether the action against an indorser would lie without its being shewn that the defendant could not by using due diligence, at some time before action brought, have presented the note to the maker.

And semble, that the question of diligence is not wholly a question for the jury.

The plaintiffs sued on a promissory note, made 10th September, 1847, by Charles Clarke, payable to the order of the defendant, for 250*l.* in fifteen months with interest and indorsed by the defendant to McCuaig & Co., and by them to Joseph Pierson, and by him to M. W. & C. Browne, and by them to the plaintiffs.

The declaration averred in the first count that Clarke did not pay the said note, "*although the same was duly presented on the day when it became due, of which the defendant had notice, &c.*"

In the second count the plaintiff averred, that when the note became due—namely, 13th December, 1848,—*diligent search and enquiry was made after the said Clarke, in order that the note might be presented and shewn to him for the payment thereof, but that he could not on such search and enquiry be found, nor could his place of abode be discovered ; nor did he then or at any time before or since pay the said money, &c., of all which the defendant had due notice, &c.*

The defendant pleaded—first, denying presentment to Clarke; secondly, to the second count, he pleaded that diligent search and enquiry were not made for and after the said C. Clarke, as in that count alleged.

The case turned at the trial upon the question whether due diligence had been used to find C. Clarke, the maker of the note. In a memorandum endorsed on a copy of notice, put in at the trial, the clerk of the Commercial Bank at Cobourg, where the note it seems was lying, stated : “The note alluded to (C. Clarke’s, 250*l.*) was presented for payment at his residence, but on enquiring if he were in, a servant girl said he had removed; and on my asking her where to, she could not tell. Previously to my going there, however, I asked a gentleman, Mr. Goodeve, if he knew where Mr. C. Clarke had removed to, he said he understood to Woodstock; and on asking another, Mr. W. G. Strong, he said he believed to Chatham.”

This clerk, Mr. Ruthven, was examined on the trial, and swore that he had lived since June, 1846, in Cobourg, and knew Charles Clarke well, whose family had usually lived in Cobourg, but that he was often absent; that this note, being left at the bank for collection, he, witness, having heard a few days before the note fell due that Mr. Clarke and his family had left the town, went with it to the house in which he had lived, and that getting no admittance at the front door he went to the back door, which was opened by a woman; and on his enquiring after Charles Clarke she said, he did not live there, and that she did not know him; that he had moved, and she knew nothing about him. He had the note in his hand, and he said he held it out to her.

He then went to a Mr. Goodeve, and asked him if he knew where Clarke was to be found, and he said he believed Clarke had gone to Woodstock. A Mr. Corrigan was present, and expressed surprise on hearing that Clarke had left the town. He then called and enquired of a Mr. Strong where Clarke had gone, and he said he believed to Chatham. He thought that he asked Mr. Sydney Smith the same question, and that he said Clarke had removed

to Brantford or Woodstock—witness could not say which. All these were persons who, the witness said, knew Charles Clarke well, and he did not ask any others.

He delivered notice of dishonor to the defendant the same afternoon that he took the note to Clarke's former residence, when the defendant made some remark that the presentment was not proper. The notice expressed that the note had been that day presented at Charles Clarke's residence.

This witness swore, on cross-examination, that he had exchanged visits with Mr. Charles Clarke, that he had not seen him for two months, and did not know of his breaking up housekeeping or of his things being sold by auction; that he knew his brother Mr. Benjamin Clarke, who resided in Cobourg at the time, only two doors from the bank; that he, the witness, had heard casually some days before that Mr. and Mrs. C. Clarke had left Cobourg, but did not hear that he had been living at his brother's; that he knew Mr. Charles Clarke's sister and a relative of his, Dr. McNab, who lived in Cobourg; that he did not expect to find C. Clarke when he went to his late residence, for he knew he had removed; that he made no enquiry of the woman as to who was then living in the house; that he went to Mr. Benjamin Clarke's to ask him, but his store was closed; that he went to the house, but the door was not answered; that he did not go to Mrs. McNab, the sister of Mrs. Charles Clarke, or to Dr. McNab; that he did not think of them; that he knew a son of Charles Clarke's employed in D. Boulton's office, but did not go to him, and that he made no enquiry of the defendant about C. Clarke or before when he gave him the notice; that he applied to Mr. Goodeve because he was near the bank, and knew C. Clarke well.

For the defence, Mr. Benjamin Clarke was called, who swore that he is brother of C. Clarke, and had long lived in Cobourg, as well as C. Clarke; and that C. Clarke left his furniture in his late residence till about the middle of November; that he had been living with the witness shortly before that; that no secret was made of his going; that his furniture was advertised; that he had been at

Woodstock before and taken a house, and that his goods were directed to Woodstock; that he was visited by his friends at the witness's house. The witness swore, that if he had been asked he could have told at any time where his brother had gone to; that he has lived at Woodstock ever since; that he went up about 6th December, the last trip of the steamer; that his last place of residence in Cobourg was the house at which Ruthven called; his circumstances were very bad before he left; that the house was unoccupied some time, and that the witness could have told on 13th December, or for a week before, where Mr. Charles Clarke had gone to.

Mr. Weller was called, and swore that he had known C. Clarke for many years; that he stayed about three weeks with his brother B. Clarke before he went away; that he said he was going to Woodstock, and witness always knew where he had gone to.

The learned judge ruled that no presentment had been proved, and that the plaintiffs could not therefore recover on the first count, which alleged a presentment; but in regard to the second count, he considered the evidence was sufficient to prove due diligence, and he left it with that direction to the jury. It would have been prudent, he said, to have asked this defendant, the endorser, where Clarke was, because his answers might have bound him; but he could not hold that the clerk was under any necessity to do so, or that he was bound to enquire after C. Clarke's relations. He left it to the jury to say whether, under the circumstances the enquiries were pursued far enough.

The defendant's counsel moved for a nonsuit at the conclusion of the plaintiff's case, and objected to the learned judge's charge; contending that as the bank clerk had heard nearly a week before the note became due that Mr. C. Clarke had removed, he was bound to have made his enquiries earlier; and that, if he had done this, he could have presented the note at Woodstock within the proper time, and at least within some reasonable time.

The defendant, by *VanKoughnet*, Q. C., obtained a rule for a new trial on the law and evidence, and for misdirection.

Hagarty, Q. C., shewed cause. Authorities cited : Story on Bills, 327, 346, 352 ; 3 Kent's Com. 44 ; 1 C. & K. 585 ; Byles, 152 ; 2 C. & K. 547 ; 2 Str. 1087 ; 3 Campb. 262 ; Story Pro. Notes, secs. 236, 238, 241 ; 6 Ea. R. 3 ; 7 Ea. R. 43 ; Co. Litt. 56 b ; 1 B. & C. 246 ; 8 B. & C. 391 ; 12 Ea. R. 433 ; 15 Ea. R. 112.

ROBINSON, C. J., delivered the judgment of the court.

The learned judge reports that he considered the verdict to have been given with a view to the second count only, and on the ground that the plaintiffs had used due diligence to find the maker of the note.

We think there is no room for doubt in this case, when the facts are duly considered. It is no question for us in this or any other such case, whether the defendant ought to waive the legal difficulty and pay the note, whether in strictness liable or not. We have to determine upon this single question, whether upon the evidence he is in law liable ; and we must be governed in this case by the same principle which must govern us in all others, when the same question shall be raised under similar circumstances.

The contract of an indorser of a note is, in effect, that if the maker does not pay the note according to its tenor, when duly demanded of him, he, the indorser, will pay it. He is secondarily liable—the maker is first liable ; and the holder has no right to call upon the indorser till he has demanded the note of the maker, and has failed in obtaining payments.

The usages of commerce, sanctioned by law, also require that the holder should present the note to the maker in *due time*. And upon the superadded condition of presenting in due time, questions often arise, as to whether the delay has been fatal to the right to call on the indorser ; and that will depend on the special circumstances by which the delay is endeavoured to be accounted for.

Bateman v. Joseph (a), cited by Mr. *Hagarty* on the argument, was a case of this kind, or rather there the difficulty was only about two or three days' delay in giving

(a) 12 Ea. R. 433.

notice to the indorser, for the presentment had been made in due time.

But here the plaintiff is seeking to hold the defendant liable in a case in which he has never yet called upon the maker of the note at all, and the question is, whether that can be done in any case, without its being shewn that the plaintiff could not, by using due diligence, have presented the note to the maker, not on the exact day when it fell due, or within a week, or a month afterwards, but whether he could not have presented it before bringing his action against the indorser; because if he could have done so, he was bound to do it, the defendant's undertaking being only to pay in case the maker when called upon should not pay. The note in this case was not made payable in any particular house or place of business, but was a mere promise in general terms by Charles Clarke to pay this defendant or order 250*l.* in fifteen months; there was therefore no place pointed out at which the holder might have called with his note, expecting to have it paid without its being incumbent on him to look after the maker.

There being no such place of reference given to him, he was under the necessity of finding the maker if he could, and presenting the note to him, and until he had done so, he could have no right of action against the defendant unless indeed he could give such evidence as would warrant a jury in saying that up to the time of bringing his action it was impracticable for him, even using all due diligence, to have found the maker of the note. The absconding of the maker of the note or his removal from Upper Canada, would have excused him from presenting it to the maker, and without that the facts might have been such as would reasonably account for the note not being presented till long after it should have been presented in due course.

But what were the facts here? We were referred in the argument to *Hine v. Allely* (a), where the holder of an accepted bill treated it as dishonored, because he

(a) Nev. & Mg. 433.

had gone to the house of Peter Perry, the acceptor, and found it closed, and the court held that it was dishonored; in other words, that the bill, by being taken to the house named, had been duly presented; but there the bill was drawn upon Perry at No. 6, Budge Row, and therefore by his acceptance he engaged to be ready there with funds to pay it when due, and the court said it was dishonored as soon as the indorsee went to the *house at which it was made payable*, and found it closed. The note in this case was payable generally, which makes all the difference. Then holding such a note, the person going to present it, went to a house in which Clarke had lived, but from which he knew some days before that he and his family had wholly removed, and he then asked a stranger who knew nothing of Clarke if he was there, and received the answer which he must have known he would receive, that he was not there. It cannot be held that anything done on that occasion was a presentment, and it has not been relied upon as such; but yet the holder of the bill, after asking one or two persons—whom he happened to see or chose to enquire of—where Clarke was, and being told that they thought he had removed either to Brantford or Woodstock, does not then or at any future time either follow up his enquiries to ascertain where Clarke was, nor apply at Brantford or Woodstock, to one of which places he was told he had removed; but he seems to have been under the impression that what he had done would serve under the circumstances as a presentment; not that it would enable him to prove that he had inquired diligently, and could not make a presentment. Accordingly, he goes immediately to the defendant, the indorser, and delivers him a notice of presentment as having been made by him to Clarke on that day; and though he was told by the defendant that what he had done was not sufficient, he appears to have thought his duty was closed, and that seems to account for his taking afterwards no steps to gain better information, and for his not acting upon the information which he had obtained. Probably an erroneous idea of what was a legal presentment occasioned him to rest satisfied with what he had done, and

made him imagine that after he had given notice to the indorser, there would be no use at all events in inquiring further. He knew that Clarke had a brother living within two doors of the bank, and was acquainted with him ; but finding him out on the day he gave the notice he never went back afterwards to ask him whether it was to Brantford or Woodstock that his brother had removed, though he must have supposed that if he had done so he could have learned at once. Then he knew also Clarke's son and sister, both living in the same town with him, but made no enquiry of either of them. The note fell due in December, 1848, and this action was brought in March following.

No attempt was made to prove on the trial that on any day that intervened the plaintiff might not have learned without difficulty where Clarke had removed to ; and, for all that appeared, Clarke might have visited Cobourg more than once within that period.

The plaintiff should at least have shewn that he had applied to the place or places to which he was told Charles Clarke had gone, and should have given such evidence as might have satisfied the jury that he had been unable to find him even up to the time of bringing his action. If Clarke had been a subscribing witness to a deed required to be proved on a trial, would the kind of evidence given here have been sufficient to account for not producing him, so as to let in secondary evidence ? We think clearly not.

It is contended that it was for the jury to say whether due diligence had been used, and that that question was in fact submitted to them.

That point however may be stated too generally. Where it is obvious that nothing like what the law deems diligence has been used, the court will direct the jury that the party has not made out an excuse that can relieve him.

In *Beveridge v. Borgis* (a), Lord Ellenborough at once non-suited the plaintiff, because he had not shewn due diligence to find out the indorser, and to give notice to him.

And, even treating it purely as a question proper for the

(a) 1 Camp. 262.

jury, still it should go to them with a proper direction. If Mr. Ruthven, who took the bill to Clarke's late residence, had done nothing more than ask the woman whom he found scrubbing there, if she knew where Clarke was, and had relied upon that as a sufficient attempt to find him, surely the jury could not be held to have an arbitrary discretion to call that due diligence. And I think what was done in this case fell so far short of what might have been done, and of what in reason ought to have been done, that the case stands on no better ground than if no questions at all had been asked of any one; for there was an omission to apply to the most obvious sources for information; and what is even more fatal, there was an omission to make any use of the information that was obtained. If Mr. Clarke had been the only party to the note, can we imagine from anything proved on the trial, that the payee of the note would have given up the debt as lost from an inability to trace him?

"In Co. Lit. it is laid down that *reasonable* time shall be adjudged by the discretion of the justices; and so it is of *reasonable* fines, customs, &c., upon the true state of the case; for reasonableness in these cases belongeth to the knowledge of the law; it is therefore to be decided by the justices. And this being said of time, the like may be said of things uncertain, which ought to be reasonable (as in this case *reasonable diligence*); for nothing that is contrary to reason is consonant to law."

I refer to Bayley on Bills, ch. 7, sec. 1; Chitty on Bills, 280, 367, 9th Edn (a). The jury, I think, should in this case have been directed that due diligence had not been used; for that it was not shewn that there could have been any difficulty in finding out the residence of Clarke before action brought, or indeed before the note came to maturity, if any diligence had been used by the holder, who was aware of the fact of his removal for some days before.

Rule absolute—new trial without costs.

(a) Story on Bills, secs. 327, 346, 352; Story on Prom. Notes, secs. 236, 238, 241.

PECK ET AL V. PHIPPON.

Endorsement of note by payee after action brought.

A. was indebted to plaintiffs, and to get time offered them a note with an indorser. The plaintiffs agreed to accept one, and A. made a promissory note payable to plaintiffs, and procured the defendant to indorse it in blank, and delivered it so indorsed to plaintiffs. Plaintiffs discounted the note, having indorsed it under defendant's indorsement. The note having been dishonored plaintiffs took it up, struck out their indorsement, and again indorsed the note above the defendant's name, adding to their own name "without recourse," and then sued the defendant.

Held, that though the plaintiffs had not indorsed the note when the defendant indorsed it, and though their indorsement, making them stand as first indorsers on the note, was not written on it until after action brought yet that such indorsement by plaintiffs was sufficient.

Semble, also, that defendant is estopped from denying that plaintiffs' name was endorsed when it ought to have been.

Assumpsit by plaintiffs as indorseees against defendant as indorser of a promissory note for 138*l.* 8*s.* 9*d.*, dated the 15th March, 1850, by one Kerr, in favor of *certain persons* designated therein by the name and style of Peck, Bradford, and Richmond, or order, six months after date, payable at the Branch Bank of Montreal at Belleville, and indorsed by the payees to defendant, who indorsed to plaintiffs. Averment of non-payment by the maker on presentment, and of notice to the defendant. Counts for money paid, and on an account stated.

Pleas: 1st. That defendant did not indorse. 2nd. That defendant had not notice of non-payment. 3rd. That the defendant indorsed for plaintiff's accommodation and without value. 4th. That the payees named in the note did pay the said note when it fell due. 5th. That the payees named in the note, and who indorsed the same to the defendant, were and are the plaintiffs, and that the plaintiffs are the payees of the note and the persons who indorsed it to the defendant, and are liable to him as such indorsers, in the event of his paying the note.

Non-assumpsit to the other counts.

Replication takes issue on the 1st and 2nd pleas. *De injuria* to the 3rd.

Similiter to the 4th. To the 5th—that Kerr before making the note was indebted to the plaintiffs, and it was agreed between them that in consideration that Kerr would procure defendant to indorse and become surety as indorser to the

plaintiffs, that plaintiffs would give them till such note fell due to Kerr : that Kerr thereupon made the note, and that defendant, for the accommodation of Kerr, indorsed it to plaintiffs, with the intent of thereby becoming surety as indorser to the plaintiffs ; that Kerr then delivered the note to plaintiffs, who gave time to Kerr for the payment of the debt ; and that no part thereof has been paid.

Similiter to the last plea.

Rejoinder takes issue on the replication to the 3rd plea, The replication to the 5th traverses the agreement stated between Kerr and the plaintiffs, and that defendant indorsed the note with the intention of becoming surety to the plaintiffs.

At the trial, before McLean, J., at the last spring assizes at Belleville, it was proved that the note lay at the Branch Bank of Montreal at Belleville for payment, and was protested for non-payment, and notice was duly given to the defendant. At the time it fell due and was protested the defendant's name was on it apparently as first indorser, and under his name was written "Pay Q. Macnider, cashier, or bearer. Peck, Bradford & Richmond." When produced at the trial this latter indorsement had been struck out with a pen, as had also the words which were written between "cashier" and "Peck, Bradford & Richmond."—namely, "or bearer, without recourse to us." But when produced there was written above defendant's name "Peck, Bradford & Richmond, without recourse." A witness was called, who substantially proved the facts stated in the 4th plea, and that when plaintiffs got the note from Kerr it was indorsed by defendant, and they afterwards indorsed their names on it, without recourse.

It was objected by the defendant that this evidence did not prove that the plaintiffs endorsed the note to the defendant ; and that when the note fell due defendant was not liable as indorser for want of a previous indorser to him : and the objection was reserved for the consideration of the court.

Kerr, for the defence, proved that one of the plaintiffs offered him six months' time to pay them if he would get an

indorser ; that he took this note to defendant, who at first objected to indorse it, but Kerr told him that if he did indorse he would not be liable, as in case of his being called upon he could turn round upon the plaintiffs, who must be prior indorsers. Defendant knew that plaintiffs were to get the note, and Kerr told him he owed them that amount, and his indorsement would get Kerr six month's time from the plaintiffs. Defendant then did indorse it ; and Kerr handed it to the plaintiffs.

The jury found for the plaintiffs, subject to the opinion of the Court on the point reserved.

Benson moved for leave to enter a nonsuit, or for a new trial, on the ground that the verdict was contrary to law and evidence. *Wallbridge* shewed cause—citing 4 T. R. 470 ; 16 M. & W. 584, 834 ; 12 Jur. 1050 ; 6 C. B. 486 ; 14 Jur. 851. *Benson*, contra, cited 1 T. R. 167 ; 3 U. C. Reports, 290 ; Byles on Bills, 107.

ROBINSON, C.J.—The only question really is, whether the indorsement by these plaintiffs, which now stands in its proper place in the note, cannot avail them, because it was not written there until after the action brought. The action would otherwise lie, by reason of what is alleged in the replication and was proved on the trial, for it places this case within the decision in *Wilders v. Stephens* (*a*), and distinguishes it from the case of *McKay v. Doty* (*b*), which was before us this term. I mean, that the objection that the plaintiffs, being the persons who indorsed to the defendant, cannot sue him upon the note being indorsed back to them, is met by the facts stated in the replication, and in that respect there is no difficulty.

Upon the other objection—that the indorsement by Peck & Co. to the defendant was not proved so as to support the plaintiff's title to sue on the note as indorsed by the defendant, because there was no such indorsement on the note when the defendant put his name on it—no case that we have hitherto had before us presented such a question, though we have had cases where the point was whether a

(*a*) 15 M. & W. 208. (*b*) This case being similar in every respect to *Bishop v. Hayward*, 4 T. R. 470, it has been thought unnecessary to report it.

subsequent indorsee of a note payable to A. B. or order had any remedy upon it, where the payee A. B. had never indorsed it. The question is, whether, as the delivery or transfer of the note for value is the substance, and the indorsement only the form, the name* may not be written at any time—we think it may be. The defendant in this case, it is clear, indorsed this note expressly in order to make it a satisfactory note to Peck & Co., the payees, the note being made to them by Kerr their debtor, which is the natural order of the transaction. To make the defendant's indorsement available to them, it is necessary in point of form, as they are the payees, that their indorsement should precede his. He must be supposed to have known this. And, as a person knowingly indorsing a note in blank is estopped from saying that it was not a perfect note when he signed it, we think on the same principle this defendant is estopped from denying that Peck & Co's. name was put on when it ought to have been, in order to make his indorsement effectual. If Peck & Co's. indorsement had never been put on, the case would have been very different.

DRAPER, J.—Wilders v. Stevens (a) shews that a prior indorser may sue a subsequent indorser, where the latter indorser, under the circumstances, would have no recourse against such indorser.

Morris v. Walker (b) is very like the principal case. The declaration was on a promissory note, payable to the order of O. M., indorsed by O. M. to defendant and by defendant to plaintiff. Plea: that O. M., in the declaration mentioned as the payee of the note, and as the indorser thereof to defendant, is the same person as the plaintiff. Replication—that the maker of the note was indebted to the plaintiff: that it was agreed between the maker and the plaintiff that the maker should give the plaintiff a promissory note, whereby he should promise to pay to the order of the plaintiff, &c.; and that plaintiff should give time to the maker until such note fell due, provided that maker would procure defendant to indorse the note to plaintiff for and on account

(a) 15 M. & W. 208.

(b) 14 Jur. 851.

of, and to secure payment of the debt due from the maker to plaintiff, and by the way of guarantee to plaintiff for such payment; of all which defendant had notice, and agreed thereto and thereupon, &c. Demurrer—that replication was a departure from declaration.

The court agreed with the decision in *Smith v. Marsack* (a), that the replication was no departure. Lord Campbell says : “It was recognized in *Bishop v. Hayward* (b), that the present right of action might exist. It appears from *Britten v. Webb* (c), that a special declaration founded partly on an agreement and partly on the custom of merchants, where the facts were similar to the present, could not be maintained. It follows that the declaration in the present form is right, and that the plaintiff may leave unanswered the indorsement by himself to the defendant until the defendant has brought it forward as a defence, and the answer thereto by the replication is no more a departure from the declaration than it would have been if contained therein. The replication is in no respects inconsistent with the declaration, It explains and fortifies the declaration, without setting out any new cause of action.”

The direct authority of *Bishop v. Hayward* for the position that the plaintiff must not declare so as to disclose that he is indorser to the party whom he makes defendant by reason of his re-endorsing to himself (the plaintiff), remains unimpeached. Lord Campbell, however, only cited it in *Morris v. Walker* for the sake of the exception to the universality of its application contained in Lord Kenyon’s words—“I do not say but that there may be circumstances which, if disclosed on the record, might entitle the plaintiff to recover against the defendant on this note.” And, “I admit that cases might happen in which the plaintiff might have stated that he was substantially entitled to recover on this note—*e. g.*, that his own name was originally used for form only, and that it was understood by all the parties to the instrument that the note, though nominally made payable to the plaintiff, was substantially to be paid to the defendant: but if such were

 (a) 6 C. B. 486.

(b) 4 T. R. 470.

(c) 12 B. & C. 483.

the case, the note should be declared on according to its legal import." In *Britten v. Webb*, an attempt was made to prove certain circumstances sufficient to entitle the plaintiff to recover. But it failed; the Court upholding the authority of *Bishop v. Hayward*, as determining that no action was maintainable on the bill, "because that would produce circuity of action." The modern cases, however, establish that if the plaintiff avoids shewing himself to be payee and first indorser, and compels the defendant to set forth that fact, and to rely on the circuity of action which such a state of things establishes, and which would have been fatal to the plaintiff had his declaration stated the precise truth in that particular, the replication may disclose the "special circumstances" which entitled the plaintiff to recover, by shewing that in truth no such circuity of action can exist, because by a special agreement, notwithstanding the form of the note or bill, the plaintiff never was to be liable to the defendant by indorsing the bill to him; but that defendant was by his re-indorsement to become liable to plaintiff. And this decision renders it unnecessary for any pleader to try his skill in framing a declaration which would not be bad on the authority of *Bishop v. Hayward*, as involving a circuity of action; or on the authority of *Britten v. Webb*, as disclosing a special contract void as against defendant, for want of a sufficient consideration moving from plaintiff to defendant, to induce him to indorse the bill.

BURNS, J., concurred.

Per Cur.—Rule discharged.

MONTREAL MINING COMPANY V. CUTHBERTSON.

Foreign judgment—Pleading—Want of process—Montreal Mining Company—Liability for calls—Penalty for not paying.

The first count of the declaration was on a judgment of the Superior Court of Montreal.

Defendant pleaded that *he was not at any time served with any process* issuing out of the said court, at the suit of the plaintiffs, for the cause of action for which the said judgment was obtained; nor *had he at any time notice of any such process*; nor did he appear in the said court to answer the said plaintiffs; *Held bad* on demurrer, inasmuch as the pleading did not shew that the proceedings were so conducted as to deprive the defendant of the opportunity of defending himself.

The second count was for calls on certain shares in the stock of the said company

Plea—that the defendant was not at the time of action brought, nor is he the holder of the said shares or any of them; *Held*, bad on demurrer, inasmuch as it assumed that if a person ceased to be a stockholder after the call was made he would no longer be liable; whereas the provision in the statute 10 & 11 Vic. ch. 68, sec. 13, is expressly otherwise.

Assumpsit—1st count on a judgment obtained by plaintiffs against defendant in the Superior Court of Montreal, by reason of the non-performance by defendant of certain promises, and for a penalty and for costs, &c.

2nd count, for calls on certain shares in the stock of the said company.

Second plea to 1st count—that though the said judgment was in fact obtained by the plaintiffs against the defendant, he, the defendant, was *not at any time served with any process* issuing out of the said Superior Court of Montreal, at the suit of the said plaintiffs, for the causes of action upon which the said judgment was obtained as aforesaid. nor had he at any time *notice of any such process*; nor did he, the defendant, at any time appear in the said court to answer the plaintiffs in the said action on which the said judgment was so obtained.

Demurrer to 2nd plea—assigning for causes that it is not alleged in the said second plea that the judgment mentioned in the said 1st count was irregularly obtained or was irregular or void; that it is not denied that the said judgment is still in full force and effect; that all the facts in the said plea alleged may be correct, and yet the said judgment be regular, &c.

Demurrer to third plea—assigning for causes that the said 3rd plea puts in issue an immaterial allegation in the second count of the plaintiff's declaration—to wit, that the defendant was the holder of the said shares at the time of the commencement of the said suit—whereas, if the defendant were the holder of the said shares at the time when the said calls were so made, he is liable therefor; and in that the said third plea is no answer to the 3rd count of the declaration, and contains an immaterial issue, &c.

Prince, for the demurrer, referred to *Becquet v. McCarthy* (a) and *Douglass v. Forrest* (b), as supporting the

(a) 2 B. & Ad. 951.

(b) 4 Bing. 686.

demurrer to the second plea ; and the statute 10 & 11 Vic. ch. 68, sec. 13, as sustaining the demurrer to third plea.

J. Wilson, contra, cited *Ferguson v. Mahon* (a), and objected to the declaration on the ground that the style of the foreign court was not set forth.

ROBINSON, C. J.—The pleas demurred to are both bad, I think.

The second plea, although it does not conform to a precedent to be found in Mr. Chitty's work, has been adjudged bad in several recent cases, because it assumes that if the defendant was not served with process, and had no notice of process, and did not appear, it must necessarily follow that the judgment was rendered against him contrary to natural justice—as being rendered against a man who had no opportunity of being heard and no means of defending himself ; but the inference that the defendant had no opportunity of defence does not follow from what is stated in the plea, since he may have had notice of the proceeding—that is, of the action going on, and all the notice that he could have required, and that the nature of the case gave him any reason to expect or any motive for desiring.

He may have accepted declaration without process, or the proceeding in this foreign court may not be commenced, as in ours, by any writ. The defendant should have denied notice or knowledge of the proceeding. In *Cowan et al. v. Braidwood* (b) and *Reynolds et al. v. Denton* (c), there are express decisions shewing this plea to be insufficient.

The 3rd plea is also bad ; for it assumes that if a person ceases to be a stockholder after the call has been made upon him, he can no longer be sued upon the call ; but the statute is expressly otherwise, though in one part of the 13th clause there is an inaccuracy of expression which is remedied in a subsequent part of the clause.

The language of the clause clearly shews that it will be sufficient if the person sued shall be shewn to have been a shareholder at the time of the call, and it would be unreasonable if it were otherwise.

(a) 11 Ad. & E. 179.

(b) 1 M. & Gr. 882 ; 2 Scott, N. R. 138.

(c) 3 C. B. 187.

The defendant took some exception to the plaintiffs' declaration, though I find no note made on the demurrer book of his exceptions. We do not however find any substantial defect in the declaration.

It was very informal, no doubt, not to mention the style of the foreign court in which the judgment was obtained; but any exception on that ground is cured by the defendant's pleas, for he clearly recognizes the judgment to which the plaintiffs refer, and objects only to the manner in which it was obtained.

Whatever doubt there may be about the right to recover a penalty of ten per cent. for not paying the call (which depends on the right of the corporation to make such a by-law), that, as was remarked by the plaintiffs' counsel, only goes to a part of the cause of action for which the plaintiffs are suing, and could not therefore entitle the defendant to judgment on demurrer, notwithstanding his pleas are bad.

If the case were otherwise in this respect, we should have had to consider whether we could properly, under the circumstances, examine into the particulars of the judgment upon the merits; but, as it is, there is no reason why we should go into that question.

DRAPER, J.—In *Reynolds v. Fenton* (a) a similar plea to the 2nd was held bad. Tindal, C. J., says, it does not shew substantially that the defendant "had no means of being present in the Belgian court whilst the proceedings were going on against him therein." And Maule, J., distinguishes *Ferguson v. Mahon*, which was in debt on a judgment in the Common Pleas in Ireland, by saying, "The court there could take judicial notice that the law of Ireland is the same with the law of this country with regard to the commencement of this suit by process;" but how do we know what is the mode of commencing a suit in Lower Canada?

The 3rd plea is obviously bad; for it does not deny that the defendant was the holder when the calls were made,

3 (a) C. B. 187.

and his making a transfer afterwards would not discharge him from liability for such calls. The 13th section expressly provides that in order to maintain any such action it shall be sufficient to prove by one witness *that the defendant, at the time of making such call, was a shareholder, &c.*

I do not at present think the plaintiffs had any right to make a by-law such as is stated in the judgment in the first count, imposing a penalty of ten per cent. for not paying calls when due. It is very easy to perceive that this is indirectly enabling the plaintiffs to recover sixteen per cent. on the amount of calls for the first year; and the language of the act, while enabling the plaintiffs to forfeit shares, does not say a word about imposing penalties. But this is no ground for holding the declaration bad, or for discharging the defendants from the *whole* demand.

BURNS, J., concurred.

Per Cur.—Judgment for the plaintiffs.

DOE DEM. CONNORS V. ROE.

Judgment against casual ejector—No placita or continuances entered on the roll.

The judge in chambers having made an order to set aside the judgment which had been entered up against the casual ejector, for irregularity, the judgment roll having no *placita* or continuances entered in it:

Held that judgment should not have been set aside for want of them, and order rescinded.

Mr. *Patterson* obtained rule *nisi*, to rescind an order made by Mr. Justice Sullivan on the 26th March last, setting aside the judgment entered against the casual ejector, for irregularity.

Mr. *VanKoughnet* shewed cause.

The judge's summons on which the above order was made was granted the 12th March, 1851. It was to shew cause why the judgment and all subsequent proceedings should not be set aside, and James Weekes, who was tenant in possession of the premises, and had been dispossessed under the said judgment, be restored to possession, and allowed to appear and plead, on the ground that the judgment was signed against good faith, and that it was also irregular, the judgment roll being improperly made up,

having no *placita* or continuances entered on it, and being entitled as of Hilary Term, 12 Vic., and judgment not signed till Trinity, 14 Vic.

On this summons Mr. Justice Sullivan made an order that the judgment against the casual ejector and all proceedings upon it be set aside, and Weekes be restored to possession, without costs, on condition that no action be brought for the dispossession.

It was stated that Mr. Justice Sullivan made this order on the decision being cited to him which was made in this court in Doe dem. Burnham v. Simmons (a).

ROBINSON, C. J., delivered the judgment of the court.

All that is in question is, whether the judgment was rightly set aside for irregularity. It appears only to have been set aside on that ground; and the affidavits seem sufficiently to repel the charge of proceeding against good faith.

The affidavit to support the objection of irregularity, states that the judgment roll is headed or dated of Hilary Term 12 Vic.; and that judgment was signed against the casual ejector on the 16th October, 1850, without any *placita* or continuances entered on the said roll.

We think there was an inadvertence in applying the decision made by this court in Doe dem. Burnham v. Simmons to the case which was before the learned judge in chambers; for in the former case, what the court had to determine was whether the trial was regular which took place upon a *nisi prius* record, wanting those entries of *placita* and *jurata*, which formed an indispensable part of every *nisi prius* record before the making the 40th rule of court, Hilary, 13 Vic., and which it is expressly provided by the 45th rule of the same term are not to be considered as dispensed with under the 40th rule in actions of ejectment, but that in such actions the proceedings shall continue as heretofore.

So far therefore as the *nisi prius* record would have been irregular in any action before that rule, for want of any

(a) 7 U. C. R. 598.

placita or *jurata*, it must still continue to be irregular in actions of ejectment. But the question in this case was a different one : the want of continuances after judgment, when not cured by the statutes of jeofail, would still be allowed to be made at any time—*Humble v. Bland* (*a*) ; *Doe Mears v. Dolman et al.* (*b*) ; *Sir W. W. Wynne v. Middleton* (*c*) ; *Rex. v. Ponsonby* (*d*)—and we think that judgment should not have been set aside for want of them.

ATTORNEY GENERAL V. STANLEY ET AL.

Information for Intrusion—Effect of the plea of “Not Guilty.”—
21 Jac. 1 ch. 14.

Information for intrusion—Plea, “not guilty,” with the words “per stat.” in the margin. The crown gave evidence of their title commencing within twenty years before the information brought, but gave no further proof of the trespass and intrusion, and the defendants gave no evidence : *Held per Cur.* that a general verdict could not be entered for the crown.
Semle—that the crown was entitled to a writ of *amoveas manus*.

The *Attorney General*, for the Queen, filed an information on the 3rd February, 1851, stating that certain lands, tenements and hereditaments on Stanley-street, late March-street, in the city of Toronto, on the 1st February, 1851, and long before and afterwards, were in the hands and possession of the Queen, of right, as appears by record, and that these defendants, with force and arms, &c., intruded upon the possession of the Queen, and have taken and yet take the profits to their own use, and have that trespass yet continued, in contempt of the Queen, &c., and prays process of law against them to make them answer to the Queen for the trespass.

On the 25th February, 1851, defendant Malkimes, by his attorney, pleaded that he was not guilty of the trespass and intrusion or any part thereof, &c.

On the 29th March, 1851, the other defendants, by their attorney, pleaded not guilty in the same terms, and both these pleas were marked in margin of the N. P. record “by statute.”

On the 14th April, 1851, the *Attorney General* joined issue

(*a*) 6 T. R. 255. (*b*) 7 T. R. 618. (*c*) 1 Wilson 125. (*d*) 1 Wilson 303 ;
32 H. 8, ch. 30 ; 4 & 5 Anne, ch. 16, sec. 2.

on the above pleas, and an award of *ven. fac.* was entered on the record to try the said issues.

At the assizes in May, 1851, the *Attorney General* put in an inquisition upon a commission of escheat, whereby it was found by a jury, on 9th December, 1850, that one Taylor Rayland had been seized of this property; that he died seized on the 1st of January, 1845, without heirs, and without having made any disposition of it by will. No other evidence of any kind or for any other purpose was given or offered.

The jury gave their verdict for the crown.

Hallinan obtained a rule *nisi* to enter a verdict for defendants.

Gamble shewed cause. He objected: the rule should have been entitled "The Queen against Stanley"—not the Attorney General; that he was under no necessity to do more than prove the title of the crown to the possession; and that the inquisition and return shewed that Taylor Rayland had died seized in 1845 without heirs; that consequently the crown, or those under whom the crown claimed, were proved to be in possession within twenty years, and that nothing more was necessary to be proved to entitle the crown to a verdict (*a*).

Skelton and *Hallinan*, contra, argued, that the general issue per statute put in issue the fact of the defendant's intrusion, and the title of the crown also; and as to this latter, that it was not enough to produce the inquisition and return, but that the facts stated therein as constituting the title of the crown should have been proved, as the plea per stat. put them as much in issue as it did the general allegation of title contained in the information: but that, at all events, admitting that the inquisition and return were sufficient evidence of title, it was necessary to prove that the defendants were intending trespassers on the crown, and for want of this proof the verdict was wrong. The entitling of R. N. was correct (*b*).

(a) *Attorney General v. Sir J. St. Aubyns et al.*, Wight, 196; *Attorney General v. Hallett*, 1 Exch. 219.

(b) *Case of Alton Woods*, 1 Rep. 40, b; *Porter's case*, 1 Rep. 16, b.

ROBINSON, C. J.—An information of intrusion is in fact an action of trespass at the suit of the crown, not brought to gain possession or establish title, except incidentally.

The judgment is not in the nature of a seizin or possession, but only that the defendant be convicted and committed for the fine; and it includes judgment for any damages that may have been given for the trespass, and includes also an *amoveas manus*—that is, upon the judgment for the intrusion, an injunction issues for the possession against the defendants and all claiming under them.

Before there can be judgment for the intrusion in this case the issue must be disposed of. The only issue is, “not guilty.” It is insisted that, after the jury were sworn to try the truth of that issue, the crown, without offering any evidence of an intrusion, was entitled to a verdict of guilty—for that the plea of “not guilty,” as it stands upon the record, amounts to a confession that the defendants are guilty.

If it does, it must be entirely because the words “by statute” stand in the margin of the plea on the record. Whether we are to assume or not that the defendants by those words refer to stat. 21 Jac. I, ch. 14, is the question. I suppose they did, for I know of no other that can affect the right of pleading.

But that statute requires no such marginal note, nor authorizes it, nor gives any effect to it, nor says anything about it. I look on the plea just as I should if it were not there. It is neither better nor worse with it, and those words in the margin neither affect the question of what evidence the crown may or must offer, nor what may or must come from the defendant.

The crown proved no intrusion, but only gave evidence of a title commencing in 1845, and the defendants gave no evidence. If the crown had shewn their title to have commenced in 1820, I think the effect would have been just the same, as regarded the verdict to be given on the plea of not guilty. If the Attorney General had shewn a title commencing in 1820, and an intrusion by the defendants in 1850, there should have been a verdict of guilty against the

defendants, and for any damages proved. If he had shewn a title commencing in 1850, and intrusion just afterwards, the consequences would have been the same.

And the stat. 21 Jac. I. ch. 14, could have no operation till the defendants shewed the crown to have been dispossessed for twenty years, and then they would have shewn their right, in consequence of that, to remain in possession till the crown proved title, though they, the defendants, had set out no title on record.

Before that statute, the moment a defendant pleaded not guilty merely, setting out no title in himself, the king, as his title appeared of record, could have his writ of *amoveas manus*, but of course no judgment "*quod capiatur pro fine*," nor any damages, till he had proved an intrusion which was denied.

The question before us is not whether an *amoveas manus* can go, but whether a general verdict can be entered for the crown on the plea of not guilty without any evidence of intrusion, the defendant having done nothing and said nothing, but put on record a plea denying the intrusion, which we see is marked "by statute" in the margin of the record.

The only intent and effect of 21 Jac. I. ch. 14, is to enable the defendant, when he has shewn dispossession of the crown for more than twenty years, to keep possession (when he is in possession) till the king has proved his title. It gives no double plea. It gives that protection under the plea of not guilty which the crown had not before. The question raised here is one of mere form when no costs follow a verdict and judgment against the defendant. If costs did follow, it would be one of substance, but the principles by which the disposal of the case on the record must be governed would still be the same. At present I do not see but that the crown is entitled to an *amoveas manus* on the general issue, as before the statute, because the defendants have proved nothing to bring them within the statute; but I do not see that a verdict can be entered against the defendants on the plea till an intrusion is shewn.

The effect of the statute I take to be, that the defendant

may more safely plead the general issue—that is, denying the trespass—when the crown has been twenty years out of possession, without fear of an *amoveas manus* going till the crown has shewn title, and this whether the defendant has intruded or not; but I do not see that it affects the consequence of a general issue as a plea, as regards the fact of trespass, and the necessity of proving it, at least till the defendant gives evidence of dispossession of the crown, and thereby may be taken to declare, perhaps, that he does not disclaim having any connection with the title or possession, as he was understood to do before the statute when he pleaded “not guilty.”

Whether the crown can have an *amoveas manus*, and when, is a different question from whether the crown can be said to be entitled to a verdict on a plea of “not guilty” to the intrusion.

If the effect of the statute can be to save the defendant from the danger of an *amoveas manus* going before the trial, and consequently before he has shewn anything as to the dispossession of the crown, which would bring his case within it, I think at least his plea should, in the body of it, have shewn that it was a plea pleaded under the stat. 21 Jac. I. ch. 14. I do not see how we can say that it gives any advantage to him on the one hand, or dispenses with the necessity of any proof on the other hand, merely because we see a marginal note in the record made up by the crown officer.

In what manner parliament may have meant the defendant to avail himself of the protection intended to be afforded him by the 22 Jac. I. ch. 14, is not clear, either in the statute itself or in what can be met with in the books upon information and intrusion: whether, if he desires to shew, as a case under the statute, that the crown has been dispossessed for more than twenty years, in order that an *amoveas manus* may not issue before the title has been tried, he should, in the body of his plea of not guilty, state, that he pleads it under the statute averring the fact of dispossession, or might move to stay the *amoveas manus*, or might plead in bar of any such writ at the same time that he

pleads the general issue, seems doubtful. That would be no double plea to the alleged trespass.

However this may be, I am of opinion that the Crown did not shew a right to recover on the only issue raised, or by reason of any matter shewn.

DRAPER, J.—Wightwick, 196, and Plowden, 337, 561, shew that the information for intrusion is but a personal suit, and in effect nothing more than trespass, though defendant may be amoved by a writ—Finch, 241.

The statute 21 Jac. 1, ch. 14, enacts, that “whensoever the king, and such from or under whom the king claimeth, and all others claiming under the same title under which the king claimeth, shall have been out of possession by the space of twenty years, or shall not have taken the profits of any lands, tenements, or hereditaments, within the space of twenty years before any information of intrusion brought or to be brought to recover the same, in every such case the defendant may plead the general issue, if he so think fit, and shall not be pressed to plead specially, and *in such cases* the defendant shall retain the possession he had at the time of such information exhibited until the *title be tried*, found, or adjudged, for the king.”

As a general rule, in an information of intrusion into crown lands, a defendant cannot simply deny the title of the crown, but must specially shew his own title (*a*) on which he relies, against that of the crown as stated on the record. And (per Parke, B., in Attorney General v. Hallett) on such an information a defendant is supposed to be in possession of the lands claimed by the crown, and he must maintain his possession and shew it to be legal. If not guilty or *non intrusit generally* be pleaded, nothing but the fact of intrusion is in issue, and the defendant in possession may be immediately evicted. Here the plea is not guilty per statute—invoking the aid of the statute of James—thus putting the crown on proof of title and possession within twenty years, without disclosing by what title the defendant claims the possession against the crown, and thus depriving the crown of the right of traversing the title alleged by the

(a) 4 Inst. 116; Leigh v. Hudson, 2 Dy 238, b.

plea, instead of maintaining the information and the title by matter of record therein alleged (a). It seems to me that such a plea admits the defendants to be in possession, and that the only question is, whether enough has been shewn to entitle the crown to a verdict on the title, the plea *per statute* being in the nature of a traverse of the title of the crown.

The information states that certain lands, tenements, and hereditaments situate on Stanley Street, late March Street, in the City of Toronto, on the 4th February, 1851, and long before, and always after were in the hands and possession of our Lady the Queen *jure coronæ*, and of right ought to be, as appears of record, and that defendants intrude. The defendants plead not guilty *per statute*. Verdict for the crown.

There is also a formal objection to the making up of the record, which is done according to the rule of Hilary, 1850.—See Attorney General v. Parsons (b).

If the defendants' plea is to be considered as putting the intrusion in issue—the case not being within the statute, because Taylor Ragland, through whom the title of the crown accrues, died in possession in 1845—then, without trying *that issue*, the crown is entitled immediately to evict the defendants in possession, and need not proceed for damages for the trespass. And, if the plea is to be considered as under the statute, then it amounts to a *claim to hold the possession* until the title is tried, found, and adjudged for the king, because it amounts to an assertion that neither the crown, nor those claiming under the same title, have been in possession within twenty years; but the moment the injunction taken on the commission of escheat was put in, that defence failed. The crown's title of record was established, and the possession within twenty years, which I take were the matters put in issue by the plea under the statute, and not that defendants were in possession, which it seems to me the plea so pleaded admits when it involves

(a) Rex v. Bishop of Worcester, Vaughan 53, 62; Rex v. Jervise et al. in Quare Impt., Sir T. Jones 8; Keilew 175, a pl. 7; Keilew 192, pl. 3.

(b) 2 M. & W. 23.

the claim to retain possession until the title of the crown is proved. So that in either view of the case the crown is entitled to evict the defendants, if in possession; and even if the plea as pleaded is a traverse of the *intrusion* and of the crown title, the moment the latter is proved the defendants should, if in possession, be evicted, and the crown need not, as it appears to me, proceed for damages for the trespass.

BURNS, J., concurred.

Per Cur—Judgment against the crown, on issue raised.

DOE DEM. MCGILL V. LANGTON.

*By-law imposing tax on wild lands—Sale of land for arrears of such taxes—
4 & 5 Vic. ch. 10.*

The Municipal Council of the district of Colborne passed a by-law, imposing a tax *per acre* on unoccupied or wild lands, for the purpose of improving the roads and bridges, and liquidating the debt of the district. *Held*, that the by-law was bad, inasmuch as the council had no power to impose a tax for repairing the roads and bridges generally, nor to confine such tax to unoccupied lands only, nor to impose a tax of so much per acre, instead of an assessment of so much in the pound on the assessed value, and the land having been sold for arrears of such taxes, in addition to arrears which had accrued under the statute; *Held*, that the sale was nevertheless void, and that the sheriff's deed was inoperative, and conveyed no title.

Quære, whether the district council could direct land to be sold for payment of taxes, imposed not by the provincial statute, but by their by-law?

Ejectment for lot 10, in the 1st concession, township of Belmont, county of Peterborough.

Demise laid the 1st of January, 1851.

Plea and consent rule by present defendant.

Lease, entry, and ouster, confessed.

It was admitted that the lot in question was sold for arrears of taxes by the sheriff of the county of Peterborough, (then the district of Colborne) on 3rd October, 1849, and that the defendant became the purchaser at such sale, and is now possessed thereof as vendee of the sheriff: that long before and at that time the lessor of the plaintiff was seized of said lot in fee, and if not barred by said sale, is still the lawful owner: that said lot was always, up to, and at the time of the sale, unoccupied, and up to, the time of sale there was no sufficient distress thereon: that said lessor resided out of the district; and that the lot was a surveyed lot, and returned as unoccupied by the treasurer of the

district: that on the 11th of November, 1842, the Municipal Council of the district of Colborne, passed a by-law in the following words :—

“ A by-law to make provision for levying rates and assessments on lands and other ratable property throughout the district of Colborne.

“ Passed November 11th, 1842.

“ Be it therefore enacted by the Municipal Council of the district of Colborne, in council assembled :—

“ 1. That for the purpose of raising a sufficient sum of money to meet the expenses of this district, the sum of one penny per acre be assessed and levied on lands within this said district, in lieu of the taxes heretofore imposed by law.

“ 2. That for the like purpose (in lieu of the present rate of assessment imposed by law) the sum of two pence in the pound be assessed and levied on all ratable property (except lands) in this district, according to the rates now established by law.

“ 3. That the said rates be levied and collected by the collectors of the townships, and paid over to the treasurer of the district, as is by law required.

“ 4. That for the purpose of improving the roads and bridges, and liquidating the debt of the district, there be raised and levied on all lands unoccupied and not included in the assessment roll in lieu of the present wild land tax, the sum of one penny per acre, which said sum of one penny per acre, with any increased rate as is hereafter provided, shall be equally proportioned towards the erection, maintaining, or keeping in repair any new or existing road or bridge in the township in which such sum has been raised, and the liquidation of said debt of the district.

“ 5. That when the rates and assessments upon any piece or parcel of land shall be suffered to remain in arrear and unpaid for the space of two years, the rate or assessment shall be increased to one penny halfpenny per acre for each and every year the said rate and assessment shall remain unpaid.

“ 6. That the rates and assessments hereinbefore directed, be levied in the manner now prescribed by law.

"7. That the sum to be raised in any one year during the continuance of this by-law, shall be limited to 4,000*l.*; and that in case the said rates assessed within the district shall in any year exceed the sum of 4,000*l.*, then and in such case the said rates shall be apportioned and assessed equally upon all the said property, and reduced accordingly.

"8. That this by-law shall commence and take effect on and from the 1st day of January, 1843.

(Signed) "G. A. HILL,
"Warden."

The lot in question was sold for taxes claimed to be due from and after 1st July, 1840, to 1st July, 1848.

The taxes from 1st July, 1840, to 1st January, 1843, were imposed by the Quarter Sessions, under 59 Geo. III., ch. 7; after the rate of one-fifth of a penny per acre, together with one-eighth of a penny per acre under 59 Geo. III., ch. 8.

The above by-law professed to come into effect on and upon the 1st January, 1843.

Under this by-law one penny was imposed per acre for the years from 1st January, 1843, to the 1st of July, 1848.

No more than one penny per acre had been levied since 1st January, 1843.

The amount of each year's taxes, including the increase for being in arrear, stood as follows, for 200 acres:—

From 1st July, 1840, to 1st July, 1841.....£0 8 0

" " 1841, " 1842..... 0 8 0

" " 1842, " 1843..... 0 12 4

(The 1st six months under statute, the last under by-law).

" " 1843, " 1844..... 0 16 8

" " 1844, " 1845..... 0 16 8

" " 1845, " 1846..... 0 16 8

" " 1846, " 1847..... 0 16 8

" " 1847, " 1848..... 0 16 8

Arrears in all.....£5 11 8

The said lot was advertised for sale 1st of July, 1848, and sold 3rd October, 1849. No question arose on the mode of advertising; or of authority given to the sheriff; or on the details of sale, &c.

The lot was sold under the authority of the district

council, and for arrears of taxes as aforesaid, claimed under said by-law; and it is the validity of a sale for taxes under the rate of assessment imposed by that by-law that is now in question.

Hagarty, Q. C., contended that the sale to the defendant was illegal, and no estate passed thereby: that the by-law was wholly inoperative and void, and an excess of authority on the part of the council: that this by-law did not direct what part of the sum proposed to be raised should be borne by the land; nor in any way settle or shew the amount necessary to be raised on an equal assessment of all assessable land: that the by-law did not distinctly state the purposes for which the same was passed, or such assessment required, nor the sum required to be raised thereunder: that the by-law, especially in the 4th section, directed a levy of one penny per acre, for purposes wholly unfixed, and vague as to the amount required: that there was no power given to enforce the rates imposed by the council, by sale of the lands, nor did such by-law shew how such rates were to be recovered: that the by-law was contrary to law in assessing land at so much per acre, and not imposing a rate on its assessed value; nor was any value stated; nor whether the sum per acre might not be more than two pence in the pound on assessed value.

D. B. Read, for the defendant, contended that the by-law in question was legal; and the taxes thereby imposed such as the council had power to direct should be raised and levied: that too much was directed to be raised and levied by the by-law, or the sheriff directed to sell the land for the purpose of levying a greater amount of taxes than the council had a right to impose, the sale of the land was legal, and the purchaser acquired a good title; if there was some amount of taxes in arrear, subjecting the land to be sold for non-payment thereof, though not the amount the sheriff was directed to make: that the title of the purchaser was good—the by-law not having been quashed or rescinded, and the authority given to the sheriff not having been moved against or set aside.

If the court should be of opinion that under the facts the

lessor of the plaintiff was entitled to recover in this action, it was agreed that there should be judgment as by confession entered for him, with one shilling damages.

If the court should be of opinion that the defendant was entitled to judgment, then a nonsuit should be entered.

ROBINSON, C. J., delivered the judgment of the court.

As connected with the question raised by this special case I have found it material to refer to the statutes 59 Geo. III. ch. 7, secs. 2, 7, 14, & 15; 59 Geo. III. ch. 8, sec. 3; 6 Geo. IV. ch. 7. secs. 7 & 8; 4 & 5 Vic. ch. 10, secs. 39, 41, 42, 51, & 57; 12 Vic. ch. 81, secs. 41, (pt 22) 155, 156, 13 & 14 Vic. ch. 67, secs. 6, 11, 12, 46; 14 & 15 Vic. ch. 109, schedule A, No. 21; 14 & 15 Vic. ch. 110, sec. 6; as well as the by-law itself, of which the validity is impeached.

Some of the statutory provisions which I have just referred to are no further material to the decision of any question now raised, than as they may serve to throw light upon the intention of the legislature in their former provisions.

The case submitted to us has been fully and carefully stated.

On examining the by-law of the district of Colborne of 11th November, 1842, it seems too clear to admit of doubt, that it was one beyond the competence of the district council to pass; and if so, it cannot be held valid for the purpose of sustaining any proceeding which depends on its legality. The fact that it has not been quashed nor complained of within any limited time would not make it binding, for even in regard to by-laws that may be passed and specially promulgated under the late act 14 & 15 Vic. ch. 109, their not being moved against within a certain time and quashed, will only establish their validity "*so far as they shall ordain or direct anything within the proper competence of the corporation to ordain or direct.*"

The legislature has been careful to insert that qualification, which, if they had been silent in respect to it, we must still have implied, or the most monstrous confusion and injustice might have followed.

The district council of Colborne when they passed their by-law, were acting on the authority given them by the statute 4 & 5 Vic. ch. 10, but they disregarded its provisions, and executed their delegated authority in a manner contrary to that law, as well as to the existing assessment laws of the province.

It is not perhaps necessary for disposing of this case that we should absolutely determine the point, whether a by-law, so general in its terms as this is with regard to the objects to be accomplished by it, can be held legal ; but I incline to think that the 4 & 5 Vic. ch. 10, sec. 39, required that when the councils resolved to raise money for making or repairing a road, they should in the same or some other by-law specify the particular road which they intended to make or repair, and the sum of money which they intended to raise for the purpose ; for otherwise there could be no basis for their calculation, and no means of making that apportionment which the law required.

And I am quite clear that they had no power to pass a by-law levying a tax, not for making or repairing certain roads or bridges only, nor for making or repairing roads or bridges in any one year, but generally, “for improving *roads and bridges*,” and confining the burden of such tax to unoccupied lands only ; nor could they legally throw upon unoccupied lands alone a tax not only for the year, but perpetual, for liquidating the debt of the district.

Nor could they legally impose, as they assumed to do, a tax of so much per acre, instead of an assessment of so much in the pound on the assessed value. I consider the intention and effect of the 4 & 5 Vic. ch. 10, secs. 39 & 41, to be, that the council having determined to raise a certain sum for a certain purpose within the scope of their authority, were bound to raise the sum by assessment to be laid on equally by a rate proportioned to the value assigned to each description of taxable property by the existing law, and that their rate should either bear equally on all descriptions of property assessed ; or, if they pleased, they might make a special provision in regard to the land, not the unoccupied land merely, *but all the land, to this effect*—that of the specified

sums to be levied for the year, for the particular purposes described in their by-law, they might assign a specified portion—that is, a certain amount in pounds and shillings—to be raised upon the land (*i.e.* all the land in the district); which sum must be raised by assessing it at so much per pound, as might be necessary on the estimated value of such land, as fixed by law for the purpose of taxation, taking care that all their rates on land for the year for all purposes should not exceed $1\frac{1}{2}d.$ per acre:

Instead of following the direction plainly given by the act, this by-law imposes on wild lands alone, not on all the lands of the county, a tax per acre, not a rate per pound, on the value of the acre, as fixed by law, which tax is raised not for any particular purpose so defined, that it can be seen whether one hundred pounds is to be raised or ten thousand, but for the purpose “of improving the roads and bridges, and liquidating the debts of the district;” the one object being indefinite in its nature, because it might absorb an expenditure of hundreds of thousands of pounds continued through generations; and the other, as to public debts, being equally undefined in the by-law, though necessarily in its nature capable of being ascertained as to amount. But the effect of this by-law is to throw upon the proprietors of unoccupied lands the whole burthen of improving the roads and of paying the public debt—a provision as clearly unreasonable as it is illegal.

Then the by-law limits the sum to be raised in any one year to 4,000*l.*

But if, without making any questionable distinctions between unoccupied lands and other lands, and without deviating from the law of the land in taxing by the acre, instead of by a rate on the assessed value, not to exceed in the result so much per acre, the district council had passed a by-law laying a perpetual burthen on all the ratable property of the district of 4,000*l.* per annum, to meet the expenses of the district, and to make and repair roads and bridges, and to liquidate the public debt, I think such a law, though free from several exceptions to which this law is liable, would still have been inconsistent with the

letter and spirit of the statute 4 & 5 Vic., and of our assessment laws, and therefore void.

But then it is to be considered, that in this case the land has been sold not entirely to make the tax imposed by this by-law, which we must hold to be illegal, but that 28s. out of 5*l.* 11s. 8*d.* was an arrear accrued under the provincial statute ; and Mr. *Reid* contended, that as part of the sum was thus rightfully levied, whatever the case may be as to the other, that will enable us to treat the sale as not wholly illegal, and thus uphold the title of the purchaser ; but we think we cannot assent to that argument. The whole land was sold to make up the one sum—we cannot divide it, and hold that part of the land was legally sold, and part not. We cannot distinguish ; and the owner had no means of redemption but by paying all.

It has been made a question in this case, whether the district council could legally direct lands to be sold for payment of taxes, imposed not by the provincial statutes, but by their by-laws. That is a point certainly not clear upon the face of the District Council Act : I mean it is not clear what the legislature intended, and not clear either, I think, what powers may be assumed in that respect under the language, very general in its nature, which is used in the statute. After frequently perusing the 39th, 41st, 42nd and 57th clauses, I am not satisfied whether the legislature intended that the district councils might abrogate the rates imposed by 59 Geo. III. ch. 7 & 8, upon lands, and substitute others for them ; the 42nd clause seems to give them the authority, but on a careful consideration of it the point is not clear. Admitting that they could not merely abrogate them, but substitute others of much larger amount, then the question would be—first, whether, independently of the 57th clause of the act, the district councils could sell the lands for payment of such taxes as they might impose on lands ; and if not, then, whether that clause gives them the power, and whether they could legally, as they did by this by-law, not merely impose a rate, and provide for its collection, but add an accumulated tax by way of penalty in case of default, and direct the whole to be made by the sale of

the land. I think at present they could not impose the accumulation by way of penalty, because I take it to be a strict principle that a power delegated by the legislature to impose taxes on the subject cannot be extended by any latitude of construction. There must be clear and express authority for whatever is done in that way; and the statute gives them power only to impose rates for certain objects, and to collect those rates—not to raise half as much again as is wanted by way of penalty. As to the power of sale, it is not necessary after the opinion we have given on the other points of this case, that we should also determine that: I only therefore state it to be my present impression that without the 57th clause the district council could not have provided for the raising of their rates by sale of the lands. I take it the principles of the common law, which regulate such matters, are against it where the statute law of the land does not expressly give the authority, which the recent assessment law does, but which none of the previous statutes had done.

Whether the 57th clause, by a fair construction, does give that authority, seems to me a very doubtful point. I think it was not intended, or some provisions would have been inserted regarding sales of land; but it is difficult to say that the words are not such as to include the sale of lands where necessary.

For the reasons already given, I consider the by-law void as regards the rate imposed by it in the 4th section—that the sale was illegal, and that a verdict should be entered for the plaintiff.

Per Cur.—Verdict to be entered for the plaintiff.

CÆSAR v. NORTON.

Debt on bond—Pleading—Demurrer.

Debt on bond, whereby the defendant bound himself under a penalty to make to the plaintiff a good and sufficient deed, clear of all incumbrances, of a certain strip of land, within the term of eight years.

Plea: that within the said eight years the council of the district of London made a certain by-law, establishing a public road over and upon the said strip of land; whereby the defendant was and has been since prevented making a good and sufficient deed, clear of all incumbrances, of the said strip of land, to the said plaintiff.

Held, on demurrer, plea bad.

Held also, that the soil and freehold of roads, laid out under 4 & 5 Vic. ch. 10, does not vest in the crown.

The defendant bound himself under a penalty to make a good and sufficient deed, clear of all incumbrances, of a certain strip of land to the plaintiff, "in the term of eight years."

Being sued on his bond and the condition being set out on oyer, he pleaded that the plaintiff agreed to buy the strip of land from him for a road for the plaintiff's use; "that after the making of the bond, and before the eight years had expired—to wit, on 7th October 1848, the council of the district of London, by a by-law duly made and passed, established a public road over and upon the said piece or strip of land; and by the said by-law established the said piece or strip of land as a public road, without the consent and against the will of the defendant: that the said piece or strip of land has ever since been and now is a public road duly established in the township of South Dorchester, of which the plaintiff had notice; and that by reason thereof the defendant could not, after the passing of the said by-law, and within the said eight years or since, make a good and sufficient deed clear of all incumbrances to the said plaintiff, of the said piece of land.

The plaintiff demurred to this plea as forming no answer to the action.

Beecher, for the demurrer, as to the effect of a condition becoming impossible, referred to *Paradine v. Jane* (a); *Tufnell v. Constable* (b); *Marquis of Bute v. Thompson* (c); *Vin. Ab.* 111, 231, 234, 237; *Com. Dig.*, *Con. L.* 13—when he made the bond he took the risk, for he knew the law.

(a) *Aleyn*, 27.

(b) 7 *Ad. & Ell.* 798.

(c) 13 *M. & W.* 487.

The land does not now vest in the crown or any public body; and if so, why does not the defendant convey the fee (a).

John Wilson contra.—It clearly appears that the land was to be given for a road, *i. e.* a private road—this is admitted by the pleadings, and that plaintiff had the use of it: it was afterwards desired to make a public road, and it was legally made such. The soil of such road vested in the district council.—4 & 5 Vic. ch. 10. It was the intent of the act to vest the fee in the county: the defendant is therefore excused from the penalty of the obligation.—Co. Lit. 206; *Doe Anglesey v. Churchwardens of Rugby*. (b)

ROBINSON, C. J., delivered the judgment of the court.

After a good deal of hesitation, I have come to the conclusion that the plea is not a good defence.

This is a case in which the condition being possible to be performed at the time of making the obligation, it is averred to have become impossible by the act of the law—that is, by a change made in the law, which now disables the defendant from performing the condition.

No doubt where that is the case, the effect in general is not to make the bond single, but to avoid it altogether. The obligation, as the books express it, is saved.—Co. Littleton, 205, 6; Bac. Ab. Condition N.; 1 Salk. 198; 6 Q. B. R. 107; 7 Ad. & Ell. 805.

But then comes the doctrine, *Cy-pres*. The defendant must do whatever he can towards fulfilling it. It is not enough for him to say that he cannot do all that he engaged to do, and therefore will do nothing. He must shew that he has done whatever he can do for performing the condition; and then shew himself disabled by the act of the law, and without any concurrence of his own from doing more.

I refer to Com. Dig. Condition L., G. 14; *Alleyn's Rep.* 27.

Now by statute 50 Geo. III. ch. 1, sec. 35, it is provided that the soil and freehold of any road laid out under the authority of that act shall be in the crown. This road was not laid out under that act, but under 4 & 5 Vic. ch.

(a) 1 Salk. 198 (n).

(b) 6 Q. B. R. 107.

10, secs. 39, 51, 52, and I do not find any provision in this latter act declaring that the freehold of all new roads laid out under the statute, shall be in the crown; nor do I find anything in the 4 & 5 Vic. ch. 10 that necessarily implies it. And it would not be just to make that consequence follow by any latitude of construction, unless we could see, which I do not, that means are provided by this latter act for remunerating the proprietor for the land taken from him. The 10th clause of 50 Geo. III. did contain a provision for that purpose, but one which does not appear to me capable of being applied to roads laid out under 4 & 5 Vic. ch. 10.

The legislature could not have meant absolutely to divest the proprietor of his land, and make it the soil and freehold of the king, without making him some recompense for it; and the later regulations on this subject contained in 12 Vic. ch. 81, sec. 195, do not apply to this proceeding, which took place in 1848.

The plea seems to be framed with a view to a double line of defence. It begins by averring that the plaintiff contracted to buy this land for the purpose of a road, and I do not see the object of averring that, unless the defendant means us to infer from it that the plaintiff has all that he was to have, for that the land has since been laid out as a road by public authority; but, as that would certainly not be a defence, he does not rely on it, but seems to mean to rest his defence on the broader ground that the defendant is disabled, by the fact of the land being since made a public road, from conveying it as he had bound himself to do; but he does not, after all, urge the defence that length which it is necessary he should do, if it can be a defence at all, for he does not allege that the freehold and soil of the land is in the crown, but only that he cannot now convey it to the plaintiff *without incumbrances*, by which I suppose he means that the right of the public to use it as a highway is an incumbrance, and so he cannot strictly perform the condition. But that would be no reason why he should not convey such interest as he could, and if he can convey none he should have said so, which he does not. By assigning

his interest to the plaintiff he would at least give him the right to apply for compensation.

Per Cur.—Judgment for the plaintiff.

TOMPKINS V. SCOTT, ET AL.

Note—Pleading.

To two counts of a declaration, each charging defendants as maker and indorser respectively of a separate promissory note, one of the defendants (the indorser) pleaded that he had not due notice of the non-payment of the said promissory notes.

Held, that the plea being distributive did not raise too large an issue, and was good on special demurrer.

Assumpsit. The declaration contained two counts, each charging the defendants as maker and indorser respectively of a separate promissory note.

Plea, by Thaddeus Scott, one of the defendants—that he the said Thaddeus Scott, had not due notice of the non-payment of the said promissory notes, as in the said first and second counts of the said declaration mentioned, &c.—concluding to the country. *Special demurrer*, assigning for causes that the traverse in the said plea is too extensive, in this—to wit, that it is therein stated that he the defendant had not due notice of the non-payment of the said promissory notes in the first and second counts mentioned: that he hath not thereby denied having notice of either singly, either of which would enable the plaintiffs to maintain this suit: that it may be, for all that is alleged to the contrary, that the defendant Thaddeus Scott had notice of the non-payment of one of them: that the same is an argumentative denial of notice of non-payment of the said notes singly.

Joinder in demurrer.

Wallbridge, for demurrer, referred to *Goram v. Sweeting*, et al. (a); *Moore v. Boulcott* (b). *Eccles contra.*—The plea is good and must be taken distributively, as “though respectively” had been added—*Cousins v. Paddon* (c); *Wood v. Peyton* (d); *Bell v. Tucket* (e).

(a) 2 Saunders, 205. (b) 1 Bing. N. C. 323. (c) 4 Dowl. 495.

(d) 13 M. & W. 30. (e) 1 Dowl. N. S. 458.

ROBINSON, C. J.—This plea would more clearly have been held bad in former times than at this day, when the courts have shewn a disposition to apply statements so made distributively; and to read them as if “respectively” were inserted.

We must consider however, that here the objection is on a special demurrer; but even so, the case of *Wood v. Peyton* is an authority to support it.

DRAPER, J.—The case of *Wood v. Peyton* (a) seems to settle the question raised on this demurrer. There, to an action on two promissory notes, defendant pleaded that the said notes were and each of them was obtained from the defendant by plaintiff's fraud. Replication—that the said notes were not obtained by fraud. Special demurrer—that the replication is informal and tenders too large an issue, requiring defendant to prove that *both* notes were obtained by fraud: that the replication should have averred neither were obtained by fraud. The court held the replication good—that the words “said notes” meant “*respectively*” in the plea, and meant the same thing in the replication.

The defendant's counsel objected that if defendant had pleaded “the said notes were obtained by fraud,” he must have proved that both were—that it would not have been distributive. But Pollock, C. B. said—“The plea would be construed distributively, and the replication would be taken to have joined issue to each note. It is just as distributive as the general issue.”

The doctrine as to a plea of license to a declaration charging several trespasses, that such plea should be understood as applying to each several trespass, *reddendo singula singulis*, affords an illustration and confirmation of this view—*Barnes v. Hunt* (b).

Here there is a further argument in favor of the plea—that it is the plaintiff who is put on the proof of notice, and may, as in the case of non-assumpsit being pleaded to several common counts, recover *pro tanto*. Though, unless a plea were taken distributively in a case where the defendant, by the form of it, takes the proof on himself as if he

(a) 13 M. & W. 30.

(b) 11 Ea. R. 451.

had pleaded payment of both the notes, if he did not prove the whole, the verdict must be against him. I think the plea good.

Per Cur.—Judgment for the defendant.

DOE DEM. SHELDON V. RAMSAY ET AL.

Grant of Governor under his seal-at-arms—Power of Chief of an Indian tribe to act as agent for the tribe—Power of Commissioners of forfeited estates—59 Geo. III. ch. 12—Inquisition void for want of certainty—Description in conveyance—Meaning of phrase “more or less.”

A^d grant of lands, in 1784, by the then Governor of the Province of Quebec, &c., under his *seal-at-arms*, to the Mohawk Indians and others, conveyed no legal estate; first, as not being by letters patent under the great seal; secondly, for want of a grantee or grantees capable of holding.

Held also, that the mere fact of a chief of an Indian tribe assuming to act as a duly authorised agent, in the name and on behalf of the tribe, showed no power in him so to act; and therefore, that a lease, signed by him as agent, &c., conveyed nothing.

And consequently, that such lessee had no estate which, on his being subsequently attainted of high treason, could be forfeited to the Crown, and vest in the commissioners of forfeited estates, under 59 Geo. III. ch. 12.

Though by the 33 Hen. VIII. ch. 20, the Crown, in case of attainder for high treason, would be deemed in actual possession without any inquisition of office, yet such lands only would vest in the commissioners under 59 Geo. III. ch. 12 as should be found by an inquisition to be vested in the Crown, and therefore no more land could possibly pass by a deed from the commissioners than the inquisition had found the traitor seized of.

And held, that the inquisition could not support the conveyance which the commissioners made; for it referred to nothing which could supply proof of identity, and the commissioners were not warranted in going beyond the inquisition.

And *semble*, that the inquisition was void for want of certainty.

The defendants—James Ramsay, Hector Dickie, Mary Kerr, and John Cleator—defended for a tract of land on the south side of the Grand River, giving a description of it by metes and bounds, not expressing in what township it is, nor what quantity of lands the lines embrace.

The plaintiff in his declaration sued for land in the township of Brantford, in the county of Wentworth, and described it as “being composed of all that certain tract of Indian lands on the south-west branch of the Grand River, in the township of Brantford, beginning at the white oak tree standing on the bank of the said river, on the south side of said river, above the Indian Mill, near a hut formerly known by the name of Culver’s Hut, on the bank of said river, a few rods below said hut, said white oak tree charred on four sides, and four sides hacked, said tree standing two rods from said river, or thereabouts; and running

south 10 degrees west 16 chains, to a stake marked B. M. ; thence north 80 degrees west 38 chains 80 links ; thence north 10 degrees east, to the bank of said river ; thence along the bank of said river to the first-mentioned boundary, including all privileges of the waters of the said river in front of the said lot."

At the trial of this ejectment, at Hamilton, before Robinson, C.J., at the last assizes, the lessor of the plaintiff claimed title under a sale made to him on the 9th July, 1832, by the commissioner of forfeited estates, under the statute of Upper Canada 59 Geo. III. ch. 12. It was shown that one Mallory had been, upon indictment and outlawry thereon, attainted of high treason, committed by him in the year 1813, in giving aid to the enemy during the war then carried on between Great Britain and the United States of America. And upon an inquest of office, which followed his attainder, it was found and returned by the jury, that at the time of his committing the high treason he was seized of certain estates mentioned in the inquisition, among which were two tracts thus described : "Also a lease of a certain tract of the Indian lands, containing about 1400 acres, joining the township of Brantford, leased to him for the term of 999 years ; *and another lease, for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres, more or less ;*" and that he had no other lands to their knowledge.

It was about the last of these two tracts, described as containing "about sixty acres, more or less," that the dispute in this action has arisen.

The inquisition bore date 14th January, 58 Geo. III.

A verdict was given for the plaintiff.

Connor, Q. C., and Galt with him, in support of a rule nisi to enter a non-suit ; or for a new trial without costs, on the evidence, and for admission of evidence after the plaintiff's case closed ; objected to the inquisition having been admitted after the plaintiff's case was closed. The evidence was clear as to the quantity of land it was intended should pass—1 Sug. V. & P. ch. 7, sec. 3 ; Day v. Finn (a). The

inquisition is void for uncertainty ; and should have set out metes and bounds—Pullen v. Birkbeak (*a*). The commissioners could only make a deed such as the titles on which they were acting would warrant ; they had therefore no right to incorporate this description in their deed. A deed cannot convey 420 acres under an inquisition which only forfeited 60.

Such a grant from the crown would have been void—2 Bl. Com. 347 ; Doddington's case (*b*) ; Dowtie's case (*c*). There is no provision in the statute 59 Geo. III. ch. 12, for assigning a chattel interest in law.

Freeman, contra—The commissioners must be presumed to have exercised their authority properly—Taylor on Ev. 113, 119 ; Doe Hopley v. Young (*d*). He contended that Brant's lease to Mallory, coupled with the inquisition, made that certain which before was doubtful—“ *Id certum est quod certum reddi potest*,” and therefore the inquisition was not void for uncertainty ; and as to not producing the inquisition, he said he did not consider it necessary, as the commissioner's deed recites it and shews how the inquisition described the land.

The statutes and facts bearing on the points in dispute are fully set out in the judgment of the Chief Justice.

ROBINSON, C. J.—By the statute 59 Geo. III. ch. 12, the Government was authorised to appoint commissioners, “ in whom all the real estates which then were or thereafter might become vested in his Majesty by the attainder of persons convicted of high treason, committed during the said late war, should be vested for the purposes mentioned in the act.”

And in order that all such estates might be “ the better known, described and ascertained, and the rents, issues and profits thereof recovered for the use of his Majesty, and that due examination might be taken and satisfactorily made of all just and lawful claims to or upon such estates, the act provides that the Clerk of the Crown shall deliver to the commissioners an extract, certified under the seal of

(*a*) Carthew 453. (*b*) 2 Rep. 33 (*c*) 3 Rep. 10. (*d*) 8 Q. B. 63.

the Court of King's Bench, of all inquisitions, whereby any real or personal estate of any kind whatever shall have been returned as forfeited to his Majesty by the attainder of any person of any high treason, as aforesaid : in which extracts shall be stated the names, additions and late places of abode of the person attainted ; the species of treason of which, and the respective times, places and courts, when and where they were so attainted ; *and also the real estates, chattels real or personal, debts, &c., which in the said inquisitions are found to be forfeited by such attainder ;* and that the commissioners shall enter these extracts in a book or register to be kept by them ; an extract from which book, signed by any two of the commissioners, shall be sufficient evidence, in any court, of the matter therein certified."

And, to the end that all the estates and interest vested in the commissioners under the act may be duly published, so as all persons having interest therein may have notice thereof, in such manner as they may enter their claims upon the same, as provided by the act, it was enacted, "that the commissioners shall cause this register to be open to public inspection without fee, and transmit to the special receiver, to be appointed under the act, an authentic copy of the register."

It is also provided that the commissioners shall send to the clerk of the peace of the district in which any of the lands forfeited shall be a duplicate of every such entry, to be affixed on the door of the court-house, and to be inserted in a book to be kept by the clerk of the peace.

Provision is then made for receiving, hearing or determining the claims of any persons having or claiming any estate, right, title or interest in, to or out of any of the said estates vested or to be vested in the commissioners. And it is enacted, "that all and every the estate and interests which shall be entered in the register to be kept by the commissioners according to the directions of the act, to or upon which no claim shall be entered within the time and in the manner prescribed, shall be deemed or taken against all persons, and to all intents and purposes to be vested in the commissioners in virtue of the act."

Then by the 13th clause of the statute, the commissioners are directed to sell all and singular the real estate and chattels vested or to be vested in them by the act, by public auction, according to the best of their judgment; to give ninety days' public notice of the time and place of sale, and of the several particulars then and there to be sold; and to cause an entry to be made in their book of all and every the real and personal estate so sold, and of the buyers' names and prices paid, &c.; and, upon payment of the purchase-money to the commissioners, to execute deeds of bargain and sale for such real estates as shall be in such manner sold to the respective purchasers thereof; which deeds are required to be registered as other conveyances of lands in Upper Canada.

It was proved on the trial that the extract of the inquisition entered in the commissioners' book, and of which a copy was delivered out by their clerk as the act directs, corresponded literally with the inquisition as regarded the tract of land respecting which this question arises. The date of entry in their books is 1st March 1819, and the land is no otherwise described than thus: "And another lease, for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres, more or less." No township, county or district is named as being that in which these sixty acres are situated.

It was then proved that on the 9th July, 1823 the commissioners of forfeited estates executed an indenture between themselves of the one part, and the present lessor of the plaintiff William B. Sheldon of the other part, in which they recite the statute and their own appointment as commissioners, that Mallory had been attainted of high treason, &c., and that amongst other things "the residue of the demised term of 999 years unexpired and yet to come of and in all and singular the lands, tenements and hereditaments thereafter described, had by inquest of office been found to be forfeited to his late Majesty, as having been in the seizin of the said Mallory at the time of the committing of the said high treason; that is to say, a certain tract of the Indian lands on the south-west branch of the Grand

River, containing about sixty acres," referring to the record of the conviction and judgment, and to the inquisition. And they recite further, that the said residue of the said demised term of and in the premises aforesaid, in the said county of Haldimand (which county of Haldimand had been nowhere before mentioned, either in the inquisition or extract, or in this deed), having by virtue of the statute become duly vested in the said commissioners, they did, on the 31st day of August, 1820, having given due notice and complied with all the other requisitions of the statute, sell the said residue of the said term of and in the said premises, with the appurtenances, by public auction, to the said William B. Sheldon, he being the highest bidder for the same, according to the provisions of said act, at and for the price or sum of 17*l.* 10*s.* And then their deed witnesses that in consideration of the said sum of 17*l.* 10*s.*, and under and by virtue of the powers and authorities in the said statute contained, they thereby assigned, transferred and set over to the said William B. Sheldon, the present lessor of the plaintiff, his executors, &c., "all and singular the said residue of the said demised term of 999 years unexpired and yet to come, of and in all and singular the said parcel or tract of land situate on the south-west branch of the Grand River as aforesaid, and described in the original lease for the same from Jacob Brant [should be Joseph Brant], agent of the Six Nations Indians, to the said Bonajah Mallory, hereunto annexed, as follows—that is to say, beginning at a white oak tree standing on the bank of said river, on the south side of said river, above the Indian Mill, near a hut formerly known by the name of Culver's Hut, on the bank of said river, a few rods below said hut, said white oak tree charred [should be "blazed"] on four sides, and on four sides hacked, said tree standing about two rods from said river or thereabouts; and running south 10 degrees west 16 chains, to a stake marked B. M.; thence north 80 degrees west 38 chains 80 links; thence north 10 degrees east to the bank of said river; thence along the banks of said river to the first-mentioned boundary, including all privileges of the waters of said river on the front of

said lot, containing fifty-four acres, be the same more or less."

It will be observed that this description, which found its way into the commissioners' deed, is something quite independent of, and wholly in addition to, anything that appears in the inquisition, or in the commissioners' registered extract; and for all that appears, the sale made by the commissioners, and the public notice that preceded it, contained nothing of this particular description, but were in the same general terms as the inquisition. They ought to have corresponded with that, according to the act, and it is to be presumed therefore that they did.

This particular description by metes and bounds, it will be seen, agrees exactly with the description of the premises described in the declaration, except that it calls the land 54 acres more or less, whereas in the inquisition the tract is called 60 acres more or less. The plaintiff claims in this action all the land which, he says, this particular description, by metes and bounds, contained in the commissioners' deed will embrace. How such a description came to be imported into the deed given by the commissioners was thus explained at the trial: Mallory, upon whose attainder the land had been forfeited, had fled from the country during the war, and it was known in what part of the United States he was residing. Sheldon, some time after he had made his purchase (the time for any persons making claim to any of the land returned as forfeited by the inquisition having necessarily elapsed before the sale), went to Mallory, and obtained from him, or from his agent, the lease, or a lease under which he represented himself to have held the tract in question; thus taking an assignment of it to himself, which is indorsed on the back of it, and which is signed by one William Mallory, as agent of Bonajah Mallory.

This is dated 21st May, 1822, and he must have produced this lease to the commissioners of forfeited estates, for they have framed their deed according to it in point of description, and it is referred to in their deed as being annexed.

The commissioners no doubt did this from a desire to give to their conveyance greater certainty; and assuming

that this must have been the lease which is referred to in such general and vague terms in the inquisition, although there is a discrepancy between the two in the only thing which looks like certainty in the description given in the inquisition, the latter calling the contents of the tract "about 60 acres," and this lease "about 54 acres."

At the trial this lease was produced by the lessor of the plaintiff, and he claims to hold according to it.

It is an indenture, made the 25th January, 1805, between the Six Nations Indians, residing on the Grand River, in the province of Upper Canada, by Joseph Brant, principal chief and agent for the said Six Nations, duly authorized in their name and on their behalf to execute leases of such parts and parcels of their lands as by the said Joseph Brant shall be thought fit to be leased, of the one part, and Bonajah Mallory, of, &c., of the other part; and it recites that on the 25th day of October, 1784, at the city of Quebec, upon the representation of the said Joseph Brant, in behalf of the Six Nations of Indians, to the late General Haldimand, then governor and commander-in-chief of the province of Quebec, &c., he, the said commander-in-chief, in consideration of the early attachment to the king's cause manifested by the Mohawk Indians, and of the loss of their settlements which they thereby sustained, by an instrument in writing by him subscribed, with his seal-at-arms annexed, and since registered in the Secretary's office of the province of Upper Canada, was pleased to grant, appropriate, and assign to them and such others of the Six Nations as wished to settle in that quarter, six miles deep from each side of the Grand River, at the mouth thereof, and extending in that proportion to the head of the said river, to be enjoyed by them and their posterity forever. And this indenture witnesses, that the said Six Nations of Indians, by Joseph Brant, their agent, in consideration of a peppercorn rent, demised to Mallory, his executors, administrators, and assigns, all that certain parcel or tract of land, being part of the above-described territory, granted by the said commander-in-chief to the said Six Nations, beginning, &c., describing the land precisely as in the declaration in this

ejectment, and in the commissioners' deed afterwards made, and stating the tract to contain fifty-four acres, more or less ; to hold for 999 years, with covenant of the Six Nations Indians, by their agent, for quiet enjoyment. This instrument is signed by "Joseph Brant, agent," and by Mallory, and they both sealed it.

The commissioners' deed and this lease being produced, the chief contest at the trial was about the extent of the tract conveyed by the commissioners. Their deed, adopting the description contained in Brant's lease, professed to convey about fifty-four or sixty acres ; but the plaintiff, by the effect which he desires to give to the description, would make it embrace about four hundred and twenty acres.

420 ACRES.

60 ACRES.

S. 10° W. 16 ch.

N. 80° E.

N. 80° W. 38 chains, 80 links.

S. 10° W. 16 ch.

N. 10° E.

N. 10° E. 140 chains, 85 links.

N. 80° W. 38 chains, 80 links.

All turns on the point of departure, and that depends on what was the position of the white oak tree spoken of in the description by metes and bounds. The tree itself is no longer standing, and all traces of Culver's hut, which was a mere shanty, has long ago perished. Upon the point where that hut stood, there was a great conflict of evidence; the plaintiffs' witnesses affirming that it had stood about thirty chains higher up the Grand River than the defendants' witnesses declare it to have stood. The great difference this would make in the description arises from the circumstance of there being a great bend in the Grand River at that point. Beginning where the defendants' witnesses swore Culver's hut stood, the three lines mentioned in the description would inclose a tract of about sixty acres, lying evenly along the south bank of the Grand River, and parallel with it, in that part of its course having the east and west ends of the tract of about the same depth. It may have been commonly called sixty acres, upon a computation made of the figure as a parallelogram, supposing the points on the water's edge to be connected by a straight line; but probably the area is more correctly stated in Brant's lease at fifty-four acres, upon a computation, which throws out the curve of the river and the land covered with water. If, according to what the plaintiff contends for, the point of departure is taken on that part of the bank of the river where his witnesses described Culver's hut as standing, which is about thirty chains further to the west, then, measuring from thence south 10 degrees west 16 chains, and from thence north 80 degrees west 38 chains 80 links, as we are directed by the description, would carry us so much further to the west that a line drawn from that point on the course given in the description north 10 degrees east, instead of taking us back to the river, as it was evidently supposed it would do, by a line of about the same length as that measured back from the river at the starting point—viz., 16 chains—would, on account of the great bend of the river, not touch its bank, except by a line produced 140 chains and 85 links.

The large tract of land embraced by the bend of the river, which would be thus included, is claimed, part of it by

Indians whose cleared fields were under cultivation at the time Brant made his lease to Mallory, which clearly could never have been intended to interfere with their possessions, and the remainder by other persons to whom the government has granted the land upon sales made by them for the benefit of the Indians, with their concurrence.

The plaintiff, to shew what the description in Brant's lease would cover, called Lewis Burwell, a provincial surveyor, and relied upon a plan or survey made by Mr. Burwell, in which he had delineated the ground as surveyed by him according to the lines and courses in Brant's lease. He swore that he had commenced this survey, in May 1827, at the request of the plaintiff Sheldon, who employed him for that purpose; that knowing nothing of the former position of Culver's hut, referred to in the lease, and not having before made any survey on the Grand River, he started from a tree, which Sheldon pointed out to him as the one referred to in the lease as standing near where Culver's hut had stood; and as he proceeded in his survey from that point, the Indians, finding he was running his line through their fields, remonstrated, alleging that these were lands which they had always had in their possession, and which Brant could have made no lease of; and he found it necessary to desist. Afterwards, in 1833, he continued his survey at Sheldon's request, and made the plan produced on the trial.

Not long after he had done this, he was requested by some of those with whose possessions the description as contended for by Sheldon would interfere, to survey their property; and the government, before they made grants on behalf of the Indians, as they contemplated doing about that time, also employed him to survey that part of the country, and he then did not adopt the tree as the starting point, which he had before taken as pointed out to him by Sheldon, but he took depositions of persons whom he examined as to the true position of Culver's hut, and among them a son of Culver then living, and was perfectly satisfied, as he swore, from the evidence he received, that he had not been misled as to the starting point when he made

the survey for Mr. Sheldon ; and laying down a tract by the lines and courses in the lease, taking as his point of departure what he ascertained from the old inhabitants to whom he referred to have been the true position of Culver's hut and the tree referred to as being near it, he found the tract to embrace about the quantity of land mentioned in the lease ; and that it would be such a tract as it must have been intending to lay out, though, taking the survey either way, it would interfere with a reservation of land which seems at an early period to have been assigned to, or intended by the Indians for a family by the name of Kerr.

It seems that Brant had agreed with Mallory to construct a wooden bridge over a small stream running into the Grand River near this tract, and was to give him sixty acres of land for the job. He may possibly have had the consent of the Kerr family to interfere with their tract to the limited extent which his lease was meant to cover.

However this may be, the evidence was such as, I must say, left no doubt on my mind that a survey, such as the plaintiff contends for, never could have been such a survey as formed the basis of Brant's lease. The contents of the area which the respective surveys would embrace, do not, to my conviction, shew this more plainly than the courses and distances set down in Brant's lease ; for these shew plainly that an actual survey had been made, in order to obtain the proper terms of that description, and that the intention was to lay down a tract along the river, of moderate depth, to embrace about 60 acres, and to present a parallelogram which should lie along, and correspond with the river in that part. It was evidently found that to lay down such a tract, the rear line would require to be on a course north 80 degrees west, and so laying down a rear line on that course which would range with the general bearing of the river at that part of it, the two ends of the tract might be on the same course, and would be about the same length, and the three lines would embrace an even and convenient figure. A compass must have been used on the occasion—an actual survey must have been made, for a post is referred to in Brant's lease, as planted at the

end of the 16 chains, of which no trace can be expected to be found now. But any surveyor, or any person using a compass, if he had started from the point the plaintiff contends for, as the tree mentioned in Brant's lease, and first run south 10 degrees west 16 chains, then north 80 degrees west 38 chains 80 links, must have seen that the course was carrying away from the river, and would not be the proper course at that point, (30 chains higher up the river,) for embracing a tract of moderate dimensions lying along the river, and bounded by the river in front. He must have seen that to run the rear line on such a course at that part of the bend of the river, and for such a distance, would take him to a point from whence he could not return to the river by the same course as the line bounding the other end of his tract, without going 140 chains instead of 16, and making one end of his tract about nine times as long as the other, and without containing seven times as much land as was meant to be demised; and giving Mallory the exclusive control over one bank of the Grand River for about three miles, instead of 38 chains.

If any such line had been, it would have been made plain at once that it could not answer the purpose intended, and would have crossed fields that Indians were in the actual occupation of.

Independently of the legal questions as to what the commissioners' deed could convey, considering the inquisition on which it was founded, and the quantity of land which it expressed—which latter question indeed would apply as well to Brant's lease as to the inquisition—I found the considerations I have mentioned so convincing, that I cannot say I had the slightest doubt on my mind that those witnesses must be in the right who described Culver's hut to have stood at such a point as Mr. Burwell assumed on the evidence to be correct when he made his last survey; and not those witnesses who assigned to it a position so utterly inconsistent with what must have been the actual starting point in the survey on which Brant's lease is founded.

I explained my views very fully to the jury, and in such

a manner as could have left them under no doubt that I considered what the plaintiff contended for as altogether unreasonable and inadmissible. They were out a long time, and at length came in with a verdict for the plaintiff which seemed to me a very unsound conclusion, from the evidence.

The verdict seems to me so impossible to be reconciled with reason and probability, and so contrary to the weight of evidence, that if no other question arose in the case, we should have no difficulty in granting a new trial, that the case might receive the consideration of another jury upon the merits. There is no ground whatever afforded by the evidence for assuming any intermediate point between that which the plaintiff contends for as the point of departure, and that which the defendant maintains is the true point. It would be acting arbitrarily, and without any regard to evidence, if we were to adopt any point between. The question therefore, is nothing else then whether we are to adopt as correct the description which embraces 420 acres, or that which agrees with the inquisition and the deed, by which 60 acres at the most were understood and intended to be conveyed. There was, no doubt, evidence that, if believed, may be said to support the opinion formed by the jury that Culver's hut stood in the position which the plaintiff contended for ; but the positive and direct evidence to the contrary appears to me much the stronger ; and the most material thing is, that when we come to apply to the ground a description framed upon the supposition that the plaintiff's witnesses are right in the position they assign to the hut—we find the conclusion irresistible that either the memory of those witnesses must have deceived them, or they must be stating what they do not know.

It is plain an actual survey with a compass was made on the ground, in order to lay out and obtain a proper description of the 60 acres intended by Captain Brant to be leased to Mallory, or 54 acres, excluding the river ; the lines also I think, it is equally clear, were surveyed, because a post is referred to as having been planted at the end of a line sixteen chains from the river.

No person with compass and chain could possibly have laid out such a tract of 60 acres, starting from where the plaintiff's witnesses say Culver's hut stood, running the courses mentioned in the description contained in Brant's lease, without finding that instead of striking the river at the east end of the tract by a line of about the same length as at the other end, he would have to go nine times as far, and instead of laying out for Mallory 60 acres of land that would interfere with none of the fields and improvements of the Indians, he would be embracing in his description 420 acres, and many fields which they were actually cultivating, and houses in which they lived, which Brant, it is quite certain, never intended to lease, and which Mallory, it is equally certain, would never have been permitted to occupy, and never could have imagined were intended to be leased to him. There was not the slightest evidence that, from 1805, when Mallory received this lease, till 1812 or 1813, when he fled the country, he ever asserted a claim to any such tract of land as such a description would cover. Nor was it proved upon the trial that the lessor of the plaintiff, for very many years after the year 1820, when he bought this lease forfeited by Mallory, or supposed he was buying some interest in a lease, ever set up a claim to cover by his purchase such a tract as he now claims to, or attempted to molest those who were cultivating it, and living upon it, as they had been for years before his purchase. If he had believed when he paid the 17*l.* 10*s.* that he was bargaining for 420 acres of land, under a deed which expressed the quantity conveyed to be only 60 acres, or if he had soon afterwards any such idea, he should have lost no time in advancing such a pretension, if he ever meant to advance it; for the probability is, that there would have been no difficulty then in ascertaining the position of Culver's hut by such evidence as would have proved the matter beyond all doubt. Perhaps some remains of it were still then in existence, or the tree might have been then standing which was referred to as near it. As it is, the evidence leaves no doubt that neither Mallory himself nor the witnesses, who seem to have perplexed themselves and

the jury about the position of Culver's hut, ever had an idea that Brant had leased to Mallory more than 60 acres.

It would be strange that neither Brant, nor Mallory, nor any of the Indians, seem to have had the slightest notion that Mallory's lines took in 420 acres, and nearly three miles of the winding course of the river, although Culver's hut was there, and could be seen, and there could be no room for doubt at that time from what point the lines were to run.

How it happened, that when there was a conflict of evidence in regard to a matter which depended upon memory, and which depended on the position of an object which had perished, the jury should have disbelieved that evidence, which on the face of it was probable and attended with no difficulty, and was consistent with the deed, and with the known bargain between Captain Brant and Mallory, and should have adopted that account which it is impossible to reconcile with the intention of the parties, as expressed in the deed, and with their conduct, it is not easy to understand. And one is the more surprised when it is considered how extremely unreasonable the claim set up is, and what confusion and injustice it would create, if it could be established.

But the question upon the description is not the only question in the case. Various legal objections were taken at the trial, and insisted upon; and the lessor of the plaintiff, by setting up a claim which is in its appearance very repugnant to reason, has thrown upon the court the necessity of deciding some legal questions of no small importance, though perhaps they are not such as can be called difficult.

The lessor of the plaintiff claims the land in question under an inquisition, which gives no other description of the estate than by calling it a lease for 999 years of certain other Indian lands on the south-west bank of the Grand River, containing about 60 acres more or less; and under that lease, which is the foundation of his title, he claims 420 acres, because, he contends, the tract which is so obscurely described in the inquisition was no other than

that which Mallory had held under a lease from Brant; and he claims to have the benefit of the description of that tract as it stands in the lease. He thus identifies his title with that lease; and there is no doubt, that whatever was held by Mallory under that lease, is what the commissioners supposed they were conveying to the lessor of the plaintiff.

The first objection is, that Mallory held nothing under this lease of Brant's which the law can recognize to be a legal estate or interest, and which could be forfeited by his treason; and we have in effect determined that he did not, by the judgment which was given in this court in Easter Term, 5 Wm. IV., in the case of Doe dem. Jackson v. Wilkes.

In the first place, the Six Nations of Indians took no legal estate under the instrument given by General Sir Frederick Haldimand. He did not own the land in question, and could convey no legal interest by any instrument under *his seal at arms*. Being Governor of Canada, he could have made a grant of Crown lands by letters patent under the great seal of the province, which would have been matter of record; but he could no more grant this large tract on the Grand River, by an instrument under his seal at arms, than he could have alienated the whole of Upper Canada by such an instrument. Such an instrument could pass nothing.

But secondly, if such an instrument had been made under the great seal, in the ordinary and proper manner, it could pass no legal interest for want of a grantee or grantees, properly described and capable of holding. It grants nothing to any person or persons by name, and in their natural capacity. General Haldimand could not have incorporated the Six Nations of Indians, if he had attempted to do it expressly, by an instrument under *his seal at arms*, and still less could he do it in such a manner incidentally and indirectly by implication. A grant "to the Mohawk Indians, and such others of the Six Nations as might wish to settle on the Grand River, of a tract of land, to be enjoyed by them and their posterity forever," could not have the effect upon any principle of the law of England of vesting a

legal estate in anybody. It could amount to nothing more than what it was well understood and intended to be, a declaration by the government that it would abstain from granting those lands to others, and would reserve them to be occupied by the Indians of the Six Nations. It gave no estate in fee, or for life, or for a term of years, which the Indians could individually or collectively transmit.

Thirdly, if it could have done so, then the ordinary consequence must have followed, that the grantees could only have alienated it by a deed of their own, or a deed executed by some one as their attorney, under a due authority given by them under seal; and if there had been an attorney duly authorized by them, he could only have conveyed their lands by a deed executed in their name, not in his own.

Nothing is shewn here to prove any authority delegated to Captain Brant to part with these lands on the Grand River, so that the Indians could be dispossessed by his act of their interest in it, whatever that might be. Nothing whatever is shewn but that Joseph Brant chose to put his name and seal, as "Joseph Brant, agent," to an instrument by which he professed to alien 60 acres of the land of the Indians for 999 years. He was, no doubt, a chief among them; but we cannot say that that gave him any right to alienate to individuals whatever portion he pleased of the lands held by the crown for their use, and upon such terms as he pleased. We cannot recognize any peculiar law of real property applying to the Indians—the common law is not part savage and part civilized. The Indians, like other inhabitants of the country, can only convey such lands as they legally hold, and they must convey by deed executed by themselves, or by some person holding proper authority from them under seal, to convey their estate in their name. If the Six Nations had, in 1805, when Brant's lease was made, held a legal estate in all the lands on the Grand River, we could not hold that Captain Brant could divest them of their right to 60 acres of it, by making a deed to Mallory in his own name, without admitting that he could equally at his pleasure have divested them of their whole territory, by leasing it to Mallory for 999 years, as

he did this, at a pepper-corn rent. There is nothing here but the mere execution of a deed in a manner that could bind no one but himself, under the assertion of an authority from the Indians, which is in no manner proved.

Where the foundation is so defective it is to little purpose to consider how far it could be admitted to be a good execution of the power to lease, if any had been proved, to alienate for 999 years, at a pepper-corn rent, a tract professing to embrace 60 acres, but which, according to what the lessor of the plaintiff contends for, embraces 420 acres.

It is in my opinion quite certain that Mallory was not seized under the deed which is set up here as the foundation of his title of any legal estate whatever, and so that he could forfeit none; in which respect this case stands on the same ground as that of *Denn ex dem. Warren v. Fearnside (a)*, in which, as in this case, land had been sold by the commissioners of forfeited estates after the Scotch rebellion of 1715. The statute 1 Geo. I. ch. 50, had vested those estates in commissioners in the same manner as our statute already referred to, and no claim being made, they had been sold to the defendant. The lands had been forfeited as having been in the seizin of one Plessington, an attainted traitor, to whom a lease had been made the year before the rebellion, which lease the court held to be void, because being a lease for three lives, and so a freehold lease, it was made to commence *in futuro*. The lessee nevertheless had entered, and enjoyed under it, and had paid rent. The lease was void also for another reason, that Plessington was a papist, and disabled by statutes 11 & 12 Wm. III. ch. 4, from holding. The case was very fully argued, and the Court of Common Pleas determined that the lease, being of a freehold and made to commence *in futuro*, was therefore void: Secondly, that Plessington, entering and enjoying the premises under that void lease, was a mere tenant at will: Thirdly, that a tenant at will has no estate that he can forfeit to the crown: Fourthly, that the lease was also void on the ground of Plessington being a papist, (though on

(a) Wils. 176.

that point the court were not unanimous) : Fifthly, that the possession of Plessington (the lease being void) was the possession of Warren : so that, as the estate was never out of the possession of Warren, there was no occasion to make any claim before the commissioners under the statute 1 Geo. I. ch. 50.

The learned Judge Foster differed from the rest of the court only on the point of the legal consequence of Plessington being a papist ; thinking that he might nevertheless take for the benefit of the crown, and forfeit for his treason ; but in all the other points the court was unanimous, and it consisted of DeGrey, C. J. ; Gould, Blackstone, and Nares, JJ.

The case was several times argued, and it is so far stronger than the present against the right of the owner of the estate, and in favor of the purchaser from the commissioners of forfeited estates, that there the purchaser under the commissioners had entered and enjoyed, and no claim had been made under the statute, and yet he was dispossessed on the ground that the supposed term which had been treated as forfeited, was a void term. Here the beneficial owners of the land sought to be recovered have never been dispossessed, but the purchaser of the supposed forfeited term, which turns out to be no term, is now seeking to dispossess them, and not only so, but under a purchase of a supposed lease of 60 acres, is contending for a right to 420 acres.

That consideration brings up other questions, which have also been raised in this case, but which it is obviously not material to go into—if I am right in my opinion that no legal estate in any land was created by Captain Brant's lease, and that Mallory was seized of no interest even in the 60 acres, which he could have forfeited to the crown by his treason.

I refer now to the exceptions taken by the defendant's counsel, that the inquisition, as regards this lease, was so vague and uncertain in its terms, that nothing could vest under it in the commissioners—that the provisions of the Forfeited Estates Act, could not operate upon anything so loose and imperfect ; that the commissioners could not, by

their deed effectually convey any more or other lands than were returned and described in the inquisition itself, which was the foundation of their title; that the assuming to convey 60 acres by a description which will embrace 420 acres, if the fact be so, and which description not being contained in the inquisition or extract, cannot be taken to have received the consideration of the inquest, was therefore an unauthorized act, which can prejudice no one; and that independently of all other objections, 420 acres of land cannot pass under a deed which professes only to convey 60 acres more or less.

I do not at present see that the plaintiff's claim could be sustained against all these objections; on the contrary, my opinion is, that some, if not all of them, are well founded, and would be fatal at any rate to his case.

Great scope, no doubt, is given to the maxim *id certum est quod certum reddi potest*; but where is the reference in the inquisition to anything by which it can be made certain what was intended? "Another lease for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres more or less:" this is all the description given of what is forfeited.

For anything said in the inquisition, the land might have been fifty miles higher up or lower down the river; anywhere, in short, between the mouth and the source. The fact that Mallory did hold a lease of Indian lands which the commissioners, going beyond the inquest, and for all that appears beyond the evidence before the inquest, have annexed to their deed, does not seem to me to authorize them or us to assume that that must have been the lease to which the inquisition refers. If it be true that the description in the lease will embrace 420 acres, instead of 60, that disproves the identity, for the jury returned no such estate as that in the seizin of Mallory. The inquisition makes no mention of any lease by Brant, it speaks only of "*another lease*."

If the inquisition had returned "sixty acres on the north side of the St. Lawrence," without any further description, would that bind any land, of any quantity, which Mallory

could be shewn to have been seized of, between Kingston and the eastern limit of the province ?

It would seem rather to be a case calling for a writ of *melius inquirendum*.

The Forfeited Estates Act (sec. 12) only vests in the commissioners the estates that had been described in the register which must be, and in this case was, a transcript from the inquisition ; and that being all that was vested in them they could sell no more ; and it would be inconsistent with the intention of the act to afford protection to all parties who might have claims, either through mortgage or otherwise, if under an inquisition, and published extracts and notices, all speaking of a tract of about sixty acres, they should find themselves shut out because they did not understand 420 acres to be included, and because they did not make a claim which there was nothing in the inquisition, or extract, or notice of sale, to shew there could be any necessity for making—nothing but a description contained in a paper, which was in the pocket of Mallory when he left the province, and which never had been seen by the jury or the commissioners till after the sale.

For the reasons I have stated, I think the plaintiff wholly failed to support his right to a verdict ; and the rule must be made absolute for a nonsuit.

A nonsuit was moved for when the plaintiff closed his case, on the ground that no evidence had been given of the inquisition, which it was contended was indispensable. The plaintiff then produced a copy of the registered extract which, it was argued, should be received in the place of the original, which is made evidence of the inquisition by the statute, and this removed that ground of exception ; but the defendant's counsel then objected that the inquisition, as shewn by the extract, could not support the conveyance which the commissioners for forfeited estates had assumed to make to the lessor of the plaintiff, for it referred to nothing which could serve to supply proof of identity ; and the commissioners were not authorized to go beyond the inquisition. They could not as it was contended, found their deed upon an instrument produced to them for

the first time long after the inquisition had been returned, an instrument which the jury had no evidence of, and could not be supposed to refer to in the inquisition; and by adopting that instrument as their guide, extend the effect of the inquisition from 60 to 420 acres, which the lease would cover according to what the lessor of the plaintiff contends for.

I was under the impression at the trial that the objection was insuperable, but desired to reserve it for future consideration, because both parties had come prepared with witnesses on the point of the locality of Culver's hut, and I thought it desirable, as it might tend to put an end to contention about that fact, to have that point investigated.

If it was clearly understood by the parties, as I believe it was, that it was to be open to the defendant to renew his motion for nonsuit *in banc*. on the ground I have last stated, then our opinion is, that the rule for entering a nonsuit should be made absolute.

The exceptions to Mallory's title, to which I have adverted, do not seem to have been moved as grounds of nonsuit, but in our opinion they are insuperable objections to the plaintiff's recovery.

BURNS, J.—Two questions fairly present themselves in this case for decision, either of which, if against the plaintiff must determine against his right to maintain this action.

First: Supposing that Mallory had such an estate in his lands as could be forfeited, then did the commissioners' deed convey any estate to the lessor of the plaintiff in the lands which he seeks to recover in this action? This question naturally subdivides itself into the following: 1—Does the inquisition support the conveyance: 2—is the conveyance larger in its terms than the inquisition: and 3—if the inquisition does support the conveyance and the conveyance is not wider in terms than the inquisition, then supposing the verdict to be right as to the starting point of the description, will that be sufficient to convey the lands sought to be recovered here, the quantity of land being expressed to be 54 acres more or less, in the deed. The inquisition in this case was taken by virtue of the royal

prerogative; but the title of the crown to the lands does not depend upon office found, for by statute 33 Henry VIII., ch. 20, sec. 2, it is enacted that upon attaint of high treason, whether it be by the course of the common law or by statute, the crown shall be deemed and adjudged in actual and real possession without any office or inquisition found; and if the crown had granted the lands in this case without office found, the grant would have been good.

The statute 59 Geo. III., ch 12, vested the lands of aliens upon inquisition as therein mentioned, and also the estates real and personal of those attainted of high treason, in such commissioners as the government should appoint, and declares that such estate should be vested in the manner and for the ends and purposes in this act mentioned. Now, though Mallory's lands would have been deemed and adjudged in the possession of the crown without office, the question is whether under this act any other lands than such as were returned upon inquisition became vested in the commissioners. Although the words of the first section are wide enough to embrace all estates whatsoever, yet the 2nd section declares that to the end that all the estates of the said traitors may be the better known, described, and ascertained, it is enacted that the clerk of the crown shall deliver to the commissioners a certified extract, under the seal of the court, of all inquisitions whereby any real or personal estate of any kind whatever has been returned as forfeited by the attainder, &c.; and in these extracts shall be stated the names, additions, and late places of abode of the persons attainted, the species of treason of which, and the respective times, places, and courts, when and where they were so attainted, and also the real estates, chattels, real or personal debts, goods and effects whatsoever, which in the inquisition are found to be forfeited by such attainder; and these extracts the commissioners are to enter into a book to be kept for that purpose. The 4th section gave power to the commissioners to inquire into such estates and to sell the said real estates. The 13th section gave the commissioner power to sell the said real and personal estates by auction, &c.; and it was under this authority that

the property was sold in this case. I think the whole scope of the act shews that it was only contemplated to vest in the commissioners such estates as should be found by inquisition to be vested in the crown, because not only the past was spoken of, but the future also; and it is quite clear that in future, after the passing of the act it would only be such estates as should be returned upon inquisition found which would be vested in the commissioners. If this be so, then it appears to me the validity of the inquisition does come in question, because that is absolutely required to sustain the deed. The stat. 2 & 3 Ed. VI. ch. 8, sec. 8, has been held to apply to all inquisitions (a). No valid grant could be made upon this inquisition, because it does not state of whom the lands were held, and where nothing was found in that respect, it would be the same as stating that the jury were ignorant, and in such case a writ of *melius inquirendum* would be awarded. Then again the inquisition says the lands were certain other Indian lands which were on the south-west bank of the Grand River, which may be anywhere from the mouth of the river to its source. This certainly gives no information of the locality of the lands; and though it might be sufficient to have awarded a *melius inquirendum*, yet the description itself, if that is to be acted upon, would support any deed for any lands which might be made within a space of perhaps two hundred miles. I must say I think there is a want of certainty in this inquisition which ought to render it insufficient (b). If the inquisition can be got over, then comes the question—whether the conveyance is not wider than the inquisition? The inquisition finds as forfeited to the crown a certain tract of land containing about sixty acres more or less, on the south-west bank of the Grand River, and the conveyance upon the face of it tells us that the particular description which is set forth contains 54 acres more or less. but the plaintiff says that in fact the description contains 420 acres. The inquisition contains no boundaries, but

(a) *Vtde Doe v. Redfearn*, 12 East, 96; also notes Thomas's Coke, 1 vol. 303, 304, 2 vol. 197.

(b) *Raysing's case*, Dyer, 208.

professes to declare that Mallory at the time of his attainder was entitled to about 60 acres more or less. As I have before endeavoured to prove, the question is not in truth how much or what quantity of land Mallory had, or which he did forfeit ; but how much, and what quantity became vested in the commissioners by virtue of the act of Parliament. Without any particular words of description to limit or enlarge the expression *about 60 acres more or less*, I can never imagine that 420 acres are to pass ; and therefore when the commissioners became vested with the estate, it was with that only which had been forfeited, viz., about 60 acres. They do not profess to convey even that quantity, for they call it only 54 acres more or less. For reasons which will appear in the sequel, I cannot bring my mind to believe that more than 60 acres ever became vested in the commissioners by means of the inquisition, and consequently they could convey no more ; and if their conveyance is, by reason of a false description, made to embrace more than that, the defendant is not to be deprived of his land for that reason, even though the plaintiff's deed may be thereby rendered void for what he might otherwise claim and ought to have. But, suppose the description is correct, that is, applying the external proof upon the ground to it, and that it in truth does embrace 420 acres, that in my opinion does not help the plaintiff, because I think no more than the 60 acres were vested in the commissioners. Suppose, however, that all the land which Mallory owned did become vested in the commissioners, and that the inquisition supports the deed, then when the commissioners professed to sell 54 acres more or less, will 420 pass by that deed under a description which would cover 420 acres ? If one were selling a lot by its number or name, and misstated the number of acres, or misstated the boundaries of it, that case may be understood without difficulty ; but in this case external evidence must be applied before it can be ascertained whether the description embraces only the 54 or the 420 acres. In such latter case I conceive it is very important that we should look at the quantity the parties intended should be conveyed. To understand such

a case, we must rightly comprehend what meaning is to be attached to the expression *more or less*. In a very old case, *Day v. Finn* (a), it was held that ten acres, *sive plus sive minus*, did not pass 30 acres; and *Yelverton* held that by the expression should be intended a reasonable quantity more or less, by a quarter of an acre, or two or three at most; and if it were three acres less than ten the lessee must be content with it. In *Portman v. Mill* (b) the agreement was to sell 349 acres by estimation, be the same more or less, but on measurement it turned out to be 100 acres less, and Lord Eldon said, with respect to the difference, he never could agree that such a clause would cover so large a deficiency in the number of acres as was alleged to exist there. Sir Edward Sugden mentions a case decided in 1825, of *Gell v. Watson*, where the sale was according to a plan, and in enumerating the different quantities, the agreement proceeded to say the whole quantity was about 101 acres, 3 roods, and 29 perches. There was a deficiency of 2 acres in two of the closes which were stated to contain together 8 acres, 1 rood, and 4 perches, and the purchaser was held entitled to an abatement in the price. It is unnecessary to express any decided opinion upon the point whether the description contained in the commissioners' deed, supposing the jury to have found correctly, would pass the whole 420 acres, or should be confined to about 54 acres, because I am clearly of opinion that no more than the quantity mentioned in the inquisition, (suppose that be sufficient), can ever be held to have become vested in the commissioners—though if Mallory had more lands than those mentioned, they would be vested in the crown; but the commissioners could convey no more than under the act became vested in them; and because I am fully of opinion that the inquisition itself, in respect of the want of certainty of the description of the lands and of whom held, did not sufficiently authorize the commissioners to sell or dispose of any particular lands as belonging to Mallory—that is, certainly not as applicable to those sought to be recovered in this action.

(a) *Owen*, 133.

(b) 2 *Russ.* 571.

The second question which naturally presents itself is, whether Mallory had any forfeitable interest in the lands in dispute between these parties. Suppose the description in the commissioners' deed can be held to embrace the land, it appears from the document intended to be a lease, which the lessor of the plaintiff has put in evidence, that the land in question was part of the lands set apart by General Haldimand for the Six Nations of Indians. The instrument setting apart these lands is referred to in the lease now produced, as bearing date the 20th March, 1795, and as being duly registered in the office of the secretary of the province. It is matter of history, as is well known, that the British Government were originally the proprietors of the lands on the Grand River, and that these lands were set apart by General Haldimand, the then Governor of the province of Quebec, in order to permit the Mohawk Indians, and others of the Six Nations, who had lost their settlements situated within the American States, in consequence of their adherence to the British standard, to take possession of, and to settle upon them, and which they and their posterity were to enjoy forever. The fee simple in the lands was in the first instance vested in the commissioners; and one question is, whether the crown had divested itself of that interest, or only permitted the Indians the use and enjoyment of the lands—the crown acting in fact in the light of a parent and guardian of them, as it were, for these tribes. It never can be pretended that these Indians while situated within the limits of this province, as a British province at least, were recognized as a separate and independent nation, governed by laws of their own, distinct from the general law of the land, having a right to deal with the soil as they pleased; but they were considered as a distinct race of people, consisting of tribes associated together distinct from the general mass of the inhabitants, it is true, but yet as British subjects, and under the control of, and subject to the general law of England. As regards these lands on the Grand River, the Indians had no national existence nor any recognized patriarchal or other form of government or management, so far as we see in, any way;

the lands, as appears from the document under which the tribes claim title to them, shew that they belonged to the British Government. There seems to have been no trust created in these lands in any person or body of persons for the Indians, neither was it necessary there should be, for it was more natural the crown should be in a situation to protect their interests and treat them as a people under its care, not capable of disposing of their possessions. Although they are distinct tribes as respects their race, yet that gave them no corporate powers or existence; but so far as the lands are concerned, for all we can see, the government intended that all members of the tribe should be upon an equal footing, and each individual should have an interest in the lands to him and his posterity. The government must have considered these people as placed in such a position, and must have intended to have treated them in that light, and consequently never intended to have parted with the proprietorship of the soil. It is quite clear from the instrument signed by General Haldimand, that the government never did more than through the governor of the province permit the Indians the occupation of the lands. This permissive occupation constituted them, as it were, mere tenants-at-will to the crown; and if that be so, then it follows that they could grant no interest to Mallory, such as is pretended in this case, which could be forfeited by reason of his treason, and the plaintiff can have no title through the inquisition. Beside this view of the question there is another, which appears to be beset with insurmountable difficulties: The lease which the plaintiff produces purports to be made between the Six Nations of Indians residing on the Grand River, by Joseph Brant, principal chief and agent duly authorized in the name of them, the said Six Nations, and in their behalf to execute leases of such parts and parcels of their lands, as by the said Joseph Brant, shall be thought fit to be leased of the one part, and Mallory of the other part. It is not proved or shewn how, or in what manner Brant had or could have such authority mentioned; and, supposing the government intended the Indians to have something more in the lands

than a permissive occupation of them, it is difficult to conceive that any such authority as here pretended to be exercised amounts to a legal right of disposition. Brant professes to lease the land in dispute for a period of 999 years, and one of the absurdities of the instrument is, that it professes that the Six Nations of Indians covenant with Mallory for quiet and peaceable possession. It is a novel thing in our day to see a whole nation enter into a personal covenant for quiet enjoyment of lands, and the surprise with which that novelty strikes the mind is not the less because the parties who entered into such covenant happen to be a body of North American Indians. As before remarked, these tribes cannot be looked upon or treated as corporate bodies, without being created such in some way known to our law ; and, so far as we know, there were no means by which Brant could be appointed or have delegated to him the authority of each individual member of the tribe for himself and his posterity, to grant and dispose of the lands as he thought fit to be leased. We read that Abraham and Abimelech entered into a covenant in regard to a well, and the same thing occurs even to the present day, that the chiefs of the nomadic tribes of some parts of the east bind the tribe in respect of their dealings, though the tribe, with other tribes, is under the government of a superior authority. Whether the Indian tribes of this continent acknowledge such absolute authority, and whether it would require to be delegated by a council, I do not know ; but, whatever may be the Indian laws or customs in this respect, I take it to be clear that the property in the lands which were confessedly at one time in the crown, must be dealt with and disposed of according to the general law of the country, unless we see that the crown has intended it to be governed by some other law. Most certainly by our law, without something more than a person designating himself an agent, and signing himself as such, a whole body of persons could not be bound by the act of one. The government perhaps in transactions with a tribe may recognize the acts of those known to be the principal chiefs as being the acts of the whole body ; but that is a

very different matter from calling upon a court of justice to give effect to the alienation of lands, which, for all we can see, must be governed by the same rules and laws which regulate the title to all property within our jurisdiction. No authority is shewn in any way which could warrant Brant disposing, on behalf of the Six Nations, of these lands by such an instrument as produced in this case. It is very true, the Indians are not contesting the validity of the act of their chief; but inasmuch as the plaintiff undertakes to prove that he has a good title to the lands because Mallory owned them, and forfeited them by reason of his treason, the defendant has a right to put the plaintiff to prove a strictly legal title, and forces upon our consideration the question whether in truth Mallory had any legal interest upon which the inquisition can attach. The case of Dunn on the demise of Warren v. Fearnside (*α*), bears out this position.

Whether the jury have arrived at a sound conclusion in regard to the starting point of the description of the land may well, I think, be doubted; but that, however, was a matter within their province to decide.

Upon the legal right, however, of the lessor of the plaintiff, I feel clear he must fail, and that he never can succeed in this action, or in any action of ejectment founded upon this inquisition and Mallory's title under the instrument produced at this trial.

DRAPER, J., being concerned in this case when at the bar, gave no judgment.

JONES V. WALKER ET AL.

Covenant—Construction.

The plaintiff, Jones, had chartered a boat called the "Favorite," of Mr. Cayley, for several years. Before the expiration of this charter, a copartnership was formed between the now plaintiff and the now defendants. When this copartnership was dissolved, there was still a year to run of the above charter; and the plaintiff and defendants entered into an agreement whereby the defendants undertook to assume the above charter for the time unexpired, and to pay "F. M. Cayley, Esq., the sum of 360*l.* for the use of said steamer for the year 1847, (the remaining year of the charter,) and shall and will deliver up to the said R. Jones, or to the said F. M. Cayley, the said steamer "Favorite," on the expiration of the said charter, or otherwise account to the said Jones, or to the said Cayley, for the value of the said boat; and *generally and without exception* shall and will save the said R. Jones harmless therefrom, and from the said charter, and from all the obligations thereof."

Held, That though the words "*generally and without exception*" did literally amount to an undertaking to save plaintiff harmless from *any* demand under the charter party, yet that, when taken in connexion with the prior agreement (set out in the statement of the case) for this covenant, they would mean rather *without exception as to the description of claim* than as to time, and that defendants would be liable only for moneys accruing due under the charter party during the co-partnership, and thence to the expiration of the charter.

Held also, That defendants were not discharged from their covenant by their bankruptcy and certificate.

The plaintiff, Jones, and Walker, one of the defendants, were, in and before 1846, partners in the business of forwarding. On 25th March, 1846, they entered into sealed articles of partnership with Hilliard, of which a copy was before the court.

By it, Jones & Walker agreed "to put at the disposal of the new partnership, to be held and reckoned as partnership property, certain vessels, one of which is the steamer "Favorite," as chartered by the parties of the first part (Jones & Walker), with all and every their rights under said charter."

And Hilliard, on his part, places at the disposal of the new co-partnership, to be held and reckoned as partnership property, certain steamers and other vessels—"the charters of the foregoing four steamers to be assumed by the said (new) copartnership, and to be paid from the funds thereof to the same extent as the same were heretofore agreed upon by the said parties of the first and second parts respectively."

This copartnership was to continue during the whole season of navigation of 1846, and then to determine, unless continued by consent; and if not continued, then the whole joint stock and effects were to be sold in February following, and the proceeds and all profits realized, *after full* liquidation of all debts and demands whatever against the partnership, were to be divided equally.

On the 6th March, 1847, they dissolve partnership: the articles of dissolution are set out on over. In 1843, and before any partnership had existed, the plaintiff had chartered the steamer "Favorite," of Francis M. Cayley, for a period which would expire at the close of the navigation of 1847. By their deed of dissolution the defendants assumed the charter for the unexpired period, and agreed to pay 360*l.* to Cayley, as what would be due to him under the charter

for that year. This sum of 360*l.* forms no part of the moneys for which the action is brought. Afterwards the said Cayley prosecuted the plaintiff for money claimed to be due to him under the charter, for a period prior to the time when the defendants assumed the charter, and obtained a judgment against him for 360*l.* 10*s.*, which was entered up in the Queen's Bench for that sum, and 14*l.* 5*s.* for costs on 2nd May, 1849. This judgment was obtained for money as being due under the charter prior to the year 1847. Prior to this judgment—viz., on the 29th of September, 1848—the defendants, having become bankrupts, duly obtained their certificate in bankruptcy in Lower Canada, which was duly confirmed. The plaintiff brought this action to recover the amount of this judgment and the costs attending it, maintaining that the defendants were liable for the same under their general covenant, contained in the deed of dissolution, to save the plaintiff harmless from the said charter, and from all the obligations thereof generally and without exception.

The agreement between Jones and Walker of the 20th February, 1847, being set out on oyer was in substance as follows:—After reciting that Jones, Walker & Hilliard had carried on business during the past year as copartners, and the desire of the parties that the copartnership should be dissolved, &c., and the desire of Jones to be released from all interest and concern therein, &c., and that many debts were owing to and by the said copartnership, and that Walker had agreed to purchase Jones's interest, &c., Walker undertook, in consideration of the premises, that he would, on or before the 5th of March following, deliver or cause to be delivered to Jones, or to his agent for him, an instrument in writing, duly executed, &c., by Walker & Hilliard, to the effect "that they and each of them (the said Walker & Hilliard) shall and will settle and pay all the debts and liabilities now due by them (the said Jones, Hilliard & Walker), or which shall or may hereafter become due or payable by them by reason of their having been such copartners as aforesaid, or by reason of the said copartnership business, or for or to which the said Jones is, shall, or

may hereafter become answerable or liable for, or by reason of any sums due or payable, or to become due or payable upon or in respect of any charters or leases of boats used and employed in the said copartnership business for the time the said copartnership existed and was carried on, for or by reason of the said copartnership business, or his being or having been a partner with the said Hilliard & Walker in the said business, or which has arisen or grown out of, or may hereafter arise or grow out the said business, &c. And whereas the said steamboat, called the 'Favorite,' was employed in the said copartnership business; and whereas the said steamboat, 'Favorite,' was chartered by the said Ralph Jones from one Francis M. Cayley, for a period which will expire at the close of the navigation of and for the year 1847, at or for a price or sum of 360*l*. for the said year 1847, which will be payable to the said Francis M. Cayley, and for which the said Ralph Jones is individually responsible to the said Francis M. Cayley. Now, these presents further witness, that, upon the said James Archibald Walker furnishing to the said Ralph Jones, or his agent at Montreal appointed to receive the same, or to the said Charles S. Palsgrave, an undertaking in writing under the hands and seals of them, the said Lonson Hilliard and James Archibald Walker, that they, the said Hilliard & Walker, will assume the charter of the said steamer 'Favorite' for the time unexpired, and will pay to the said Francis M. Cayley the said sum of 360*l*. for the use of the said steamer for the season of 1847, and such interest as may become due thereupon, and shall and will save the said Ralph Jones harmless therefrom, and from the said charter and the obligations thereof, and shall and will deliver to the said Ralph Jones, or to the said Francis M. Cayley the said steamboat 'Favorite,' on the expiration of the said charter, according to the terms and condition of such charter, or otherwise account to the said Ralph Jones, or the said Francis M. Cayley, for the value of the said boat, then, and upon receipt thereof, the said Ralph Jones shall and will, and he hereby doth then assign, sell, and transfer to the said James Archibald Walker the said charter

of the said steamboat 'Favorite,' and all his right, title and interest therein, and in the said steamboat 'Favorite.'"

The agreement of the 4th of March, 1847, between Jones, Walker & Hilliard, was in substance as follows:—The said Lonson Hilliard and James Archibald Walker hereby jointly and severally covenant and undertake, for the consideration in the said articles of agreement of the 20th of February last set forth, and further, for and in consideration of the sum of five shillings currency to them in hand paid by the said Ralph Jones before the passing of these presents, to settle and pay all debts and liabilities now due by them, the said Ralph Jones, Lonson Hilliard, and James Archibald Walker, or which shall or may hereafter become payable by them, by reason of their having been such copartners, as mentioned in the said articles of agreement and as aforesaid, or by reason of the said copartnership business, or for or to which the said Ralph Jones is, or shall hereafter become liable or answerable for or by reason of any sums due or payable, or to become due or payable for, upon or in respect of any charters or leases of boats used and employed in the said copartnership business for the time the said copartnership existed and was carried on, or for or by reason of the said copartnership business, or his (the said Ralph Jones) being or having been a partner with the said Lonson Hilliard and James Archibald Walker in the said business, or which have arisen or grown out of, or which hereafter may arise or grow out of the said business. And the said Lonson Hilliard and James Archibald Walker do hereby further jointly and severally undertake and assume the charter of the steamer 'Favorite' mentioned in the said articles of agreement, for the time unexpired, as mentioned in the said articles of agreement, and will pay to Francis M. Cayley the sum of 360*l.* currency, for the use of the said steamer for the year 1847, and such interest as shall and may become due thereon, and shall and will deliver up to the said Ralph Jones, or to the said Francis M. Cayley, the said steamer 'Favorite' on the expiration of the said charter, according to the terms and conditions of the said charter, or otherwise account to the said Ralph

Jones, or to the said Francis M. Cayley, for the value of the said boat, and generally and without exception shall and will save the said Ralph Jones harmless therefrom, and from the said charter, and from all the obligations thereof.

Plea, after oyer, that defendants did undertake and assume the charter of the steamer 'Favorite' in said articles of agreement mentioned, for the unexpired time thereof, and did pay to the said Francis M. Cayley the sum of 360*l.*, for the use of the said steamer for the year of our Lord 1847, and such interest as became due thereon at the time, and according to the terms of the said articles of agreement, and did generally and without exception save plaintiff harmless therefrom, and from the said charter and all the obligations thereof, in pursuance of the said covenant of them (the defendants): conclusion to the country, and similiter.

The defendants also pleaded, that after the accruing of the said causes of action and before the commencement of suit, they became bankrupts: concluding to the country: similiter.

The questions for the consideration of the court are—Did the defendants incur a liability to plaintiff for any moneys that might be due under the charter prior to the year 1847? When did their liability commence? Are they protected by their certificate?

Mr. *Van Koughnet* for plaintiff—Defendants contend, that their covenant is prospective only, not retrospective; and they also contend, that, except as to a particular sum, they are discharged by their bankruptcy and certificate in L. C. The certificate of bankruptcy is no bar, because the judgment against Jones was not recovered till after the bankruptcy, and until that judgment was recovered Jones had no claim against the defendants.

Hagarty, Q. C., contra—The judgment recovered by Cayley against Jones was for charter money accruing due before the copartnership, except as to 36*l.* Defendants had no notice that Jones owed this sum to Cayley. Again, the covenant is for a particular sum and for a particular time, and the expression of that must exclude the general terms relied on by plaintiff. This is also a covenant to indemnify

a debt provable (a). It is a debt payable on a contingency (b).

Cameron, Q. C., in reply—The articles of copartnership throw on the firm all the liabilities arising on all the charters, and the articles of dissolution relieve plaintiff from all those liabilities. The 9 Vic., ch. 30, applies to confer a privilege on sureties to come in and prove, but it is not compulsory on them to do so. Defendants might have indemnified plaintiff at any time up to the giving of the judgment; they were his sureties to save him from his own debt; they cannot be said to have failed until a judgment was recovered against him (c).

ROBINSON, C. J.—On this covenant of 4th March, 1847, the question arises, whether it makes Walker & Hilliard liable to indemnify Jones against the claims of Cayley, under the charter party, for any part of the hire of the steamer "Favorite" for a period before the partnership was formed between Jones & Walker & Hilliard, and while she was employed in the business of Jones & Walker, or of Jones alone; or only for hire due for the period during which she was employed in the joint business of Jones, Walker & Hilliard and the period which was yet to elapse after Walker & Hilliard assumed the charter party, as they did by their instrument of 4th March, 1847.

The words of the covenant are so comprehensive that I have found it difficult to satisfy myself that we can be warranted in holding the defendants not to be responsible for the money which Jones has been compelled to pay under the charter party for the hire of the boat for the period while she was only used in his own service, or in that of Jones & Walker, and before the partnership entered into between them and Hilliard. The words "generally and *without exception* shall save Jones harmless from the said charter and all the obligations thereof," do literally amount to an engagement to save him harmless against any demand that can be made upon under the charter

(a) 9 Vic., ch. 30, sec. 32.

(b) Archbold Bankruptcy, 304-5; Lyde v. Minn, 1 M. & K. 683; 4 Sim. 505.

(c) Toppin v. Field, 17 Jar. 257.

party. Shall we then be warranted in reading it as if these words were added, "for or by reason of any thing done or suffered since the said steamer was first employed in the business of the copartnership, and from thence till the expiration of the said charter party?" I have no doubt that was intended; and upon a careful consideration of the several deeds, and reading them all in connexion and as one instrument, as I think we should do, my opinion is, that that is the construction which we should give to the instrument. The recitals in the agreement of 20th February, 1847, I think, shew that to have been intended; and the covenant of 4th March is declared to be entered into *in pursuance of that agreement*.

It was not, therefore, we may suppose, designed to go beyond the preliminary agreement. The reasonable intendment is, when the plaintiff recites that a certain sum would be due for the boat for 1847, that that only was due, or at least only that and whatever might be still due for 1846 (if anything), which his partners would be aware of as well as himself. The words "generally and *without exception*," I think, mean all claims without exception *as to the description of claim* that should be made for anything while the defendants participated in the use of the vessel; not without exception as to time, which would render the defendants liable for a debt contracted while they had no connexion with the boat or interest in her earnings.

It is quite true, that Jones, meaning to give up all business and stock, and parting with this steamer which he had chartered, might know that he was divesting himself of all means of paying Mr. Cayley the account still due for 1845, or any time before that, and he might feel it to be due to Cayley and himself not to part with the only means of earning the money for paying the debt, unless the defendants would become liable for it. It is true also, that, in the settlement of the dissolution, allowance may have been made to the defendants in consequence of their agreeing to pay this old debt, though there was no offer to prove any such thing by them. If that were so, Jones might well exact a covenant to cover all the past, and the defendants

might reasonably agree to give it, and would be bound by it. But then, I think, the covenant should expressly have included what otherwise would appear to have no relation to the partnership transactions or to the dissolution; for without such express reference, it is my opinion, though not given without some hesitation, that the covenant, taken in connexion with the recitals in both the deeds, does not, by fair construction, extend to such prior debt. The charter, I think, is only assumed for the future, and such liabilities only intended to be covered as might be incurred after Jones ceased to be solely interested in the charter party. The whole tenor of the instruments seems to call for this construction, according to the authority of *Arlington v. Meyrich* (a) and the cases there cited, among which I refer to *Liverpool Water Works Company v. Atkinson* (b). I incline to think that, according to some modern decisions, if the fact really was that this old debt was known to defendants to be due, it was intended to be provided for—that might have been shewn by the plaintiff in evidence at the trial, in order to entitle him to the full benefit of the construction of which the covenant is literally susceptible, because his evidence would not contradict the clear language of the deed, but would come in aid of that and support it against the less comprehensive construction which the accompanying recitals would otherwise suggest.

DRAPER, J.—Two questions arise:

1st. Does the covenant cover the sum sought to be recovered?

2nd. If so, does the defendant's bankruptcy before the plaintiff was obliged to pay, bar the recovery? In other words, was the plaintiff's right to be indemnified against any claim of Cayley's, a debt provable under the commission?

I find it very difficult to get over the words of this covenant, which, as set out on oyer, are, that Hilliard & Walker "do hereby further jointly and severally undertake and assume the charter of the steamer 'Favorite,' in the said articles of agreement mentioned, for the time

unexpired, as mentioned in the said articles of agreement, and will pay to F. M. Cayley the sum of 360*l.* currency, for the use of the said steamer for the year 1847, and such interest as shall and may become due thereon, and shall and will deliver up to the said Ralph Jones, or the said F. M. Cayley, the said steamer ‘Favorite’ on the expiration of the said charter, according to the terms and conditions of the said charter, or otherwise account to the said R. Jones, or F. M. Cayley, for the value of the said boat and generally and without exception shall and will save the said R. Jones harmless therefrom, and from the said charter, and from all the obligations thereof.”

Take this alone, and it contains the following stipulations:

1st. To assume the charter of the steamer “Favorite.” This may be properly considered as only operating prospectively.

2nd. To pay to F. M. Cayley 360*l.* for the use of the steamer for 1847. This is definite and clear, limited, and precise in language and application.

3rd. To pay such interest as may accrue thereon:—i e., on 360*l.*, in the event of its not being paid at the time limited by the charter.

4th. At the expiration of the charter to deliver up the “Favorite” to the plaintiff, or to F. M. Cayley, according to the terms of the charter, or otherwise to account to the plaintiff, or to F. M. Cayley, for the value thereof. This is also clear in terms, and no breach is complained of in respect to this undertaking.

5th. Generally and without exception to save the plaintiff harmless *therefrom*; which, by reference to the last antecedent means, from delivering the “Favorite” to F. M. Cayley, in the event of non-delivery to him or the plaintiff.

6th. Again, under the governing words—generally and without exception to save the plaintiff harmless from the charter.

7th. Still under the same governing words—generally and without exception to save the plaintiff harmless from all the obligations of the said charter.

It must be assumed that the defendants knew what the

charter was and what its obligations were, and that the plaintiff was liable for *all*, as well those antecedent as those subsequent to the partnership. And I do not see how it can be denied that the words of the covenant of the defendants are large enough to cover every liability which the plaintiff was subject to under the charter and its obligations. It must, therefore, be enquired, what is there to qualify, limit, and narrow the general sense and application of the words sued ?

First, there is the *recital* in the deed containing the covenant, which refers to the previous articles of agreement dated 20th February, 1847, so far shewing this deed of 4th March, 1847, to be made in pursuance of those articles. This is further shewn by the commencement of defendant's covenant, which says, that defendants do covenant and undertake, for " the considerations in the said articles of agreement." They then engage to settle and pay all the debts and liabilities due by the three as partners, as mentioned in the said articles *or* by reason of the copartnership business, *or* for or to which plaintiff may be liable, for any sums *due*, or to become *due* in respect of any charters or leases of boats used and employed in the partnership business for the time the said partnership existed *or* by reason of the partnership business *or* of the plaintiff having been a partner in the said business, and particularly will pay 1000*l.*, the price of the steamer "Swallow," with all interest from 1st February, 1846, *and* from all such debts and liabilities and all damages to arise therefrom to indemnify, &c., the plaintiff. And then follows the covenant respecting the "Favorite."

So far as this goes, it shews the covenants to indemnify, pay, &c., had exclusive relation to the business of the partnership and to liabilities arising out of, or in connexion with it.

Hilliard was no party to the articles of February, 1847. They were made between the plaintiff and the defendant Walker only. The object of them was, that plaintiff should retire from the copartnership between the three, and that Walker should purchase all the plaintiff's interest in the firm.

For this interest, Walker undertakes to pay him the sum of 1625*l.* at fixed periods, to indemnify him generally against all the partnership liabilities, and with regard to the "Favorite" there is this particular stipulation: After reciting that she was employed in the copartnership business, and was chartered by plaintiff from F. M. Cayley for a period expiring in 1847, for the sum of 360*l.* for the year 1847, and for the payment of which to F. M. Cayley, plaintiff was individually responsible, it was agreed, that, upon Walker furnishing plaintiff an undertaking under the hands and seals of defendants, that they will assume the charter of the "Favorite" for the time unexpired, and will pay to F. M. Cayley the said sum of 360*l.*, for the use of her for the year 1847, and such interest as may become due thereupon, and will save plaintiff harmless therefrom, and from the charter and the obligations thereof, and will deliver the "Favorite" to the plaintiff, or to F. M. Cayley, at the expiration of the charter, according to its conditions, or otherwise account to plaintiff, or to F. M. Cayley, for the value of the boat, then plaintiff assigns the charter of the "Favorite," and his interest therein to Walker.

This is, at all events, intended to relieve plaintiff from all liability accruing, or which had accrued on that charter during the whole period of the copartnership; and standing alone, I think it may be properly construed to limit it to that period. If the covenant of March, 1847, had strictly followed the language of these articles, I think there could be no room for question. The rest of the court, I believe, are of opinion that the introduction of the additional words, "generally and without exception," &c., was made, not to extend the indemnity over the whole *time* for which the charter was created, but only to all transactions and liabilities, enumerated or not, which happened or accrued upon, or in relation to the charter, from the beginning of the copartnership of the defendants to the end of the season of 1847, when the charter expired. I am not prepared to differ from that conclusion, though I have not been able to free my mind from great doubt upon it. But I am not, however, prepared to hold—and the words of the special case appa-

rently point to this—that the only liability of the defendants is for the sum of 360*l.* for the year 1847, and for any interest on that sum. I think the words used clearly extend over all the time the “Favorite” was in the hands of the firm; and if any part of the judgment recovered against the plaintiff is for moneys accruing due during that period, the plaintiff is, in my opinion, entitled to indemnity (a).

BURNS, J.—I have no doubt that the words of the final instrument upon the dissolution of the partnership of the parties are to be looked upon as respects the charter of the steamer “Favorite” as being larger in terms than those contained in the first agreement for the dissolution of partnership, and being so, it is right that we should consider the parties introduced them with and for some object and intent. I am content to rest my opinion upon the contents of the instrument of the 4th March, 1847, as to what intent and object the parties had in view, when they dissolved their partnership, respecting the liabilities and obligations under which the defendants came by virtue thereof. It is quite possible enough that I may be mistaken, however; still it is the best opinion I can form, upon the instrument itself, as to what the parties intended.

If the defendants mean to contest their liability for any portion of the rent of the vessel for the year 1846, by reason of the terms of the agreement only extending, as they contend, to the unexpired period of the charter at the time the agreement of dissolution entered into, I do not think it can hold good. It appears that the copartnership of the parties commenced on 25th March, 1846, and was dissolved on the 20th February, 1847; and the covenant, on the part of the defendants, when it is dissolved is, that they will settle and pay all the debts and liabilities to which the plaintiff should or might become liable or answerable for or by reason of any sum or sums then due or payable, or to become due or payable for, upon, or in respect of any charters or leases of boats used and employed in the copartnership business, for the time the copartnership existed and was carried on. Under this, the defendants were bound to discharge any

(a) 2 Saund. 411 n.; 1 Exch. 454.

sum or sums due Mr. Cayley for the year 1846, and if any portion of that remains due or be included in the judgment of Cayley against the plaintiff, the defendants' covenant will oblige them to discharge it. As respects this, the second question is, whether the bankruptcy of the defendants has discharged them from being liable in an action on the covenant. The covenant being one of indemnity, I do not think the certificate barred the plaintiff's remedy. There was no debt due or incurred by the defendants to the plaintiff, nor did the defendants incur a debt to Cayley in any way that he could prove upon the bankrupts' estate, and the plaintiff clearly could not prove any debt, and there was no way by which the value of the plaintiff's claim could be ascertained, until the plaintiff sustained damages by reason of the defendants not keeping their covenant.

The principal question between these parties, however, is, whether the words of the covenant, that the defendants generally and without exception shall and will save the plaintiff harmless from the charter of the vessel, and from all the obligations thereof, are to be construed as extending over the whole period of time for which the plaintiff chartered the vessel from Cayley. I do not think they are to be so construed; and the grounds upon which I have arrived at that conclusion are these: First, in addition to the defendants' assuming the liabilities of the partnership, they also undertake for the liabilities of the plaintiff, as follows: that is, to which the plaintiff should or might thereafter become liable or answerable, for or by reason of any sums due or payable, or to become due or payable for, upon, or in respect of any charters or leases of boats used and employed in the copartnership business, for the time the said copartnership existed and was carried on, or for or by reason of the said copartnership business, or his (the said plaintiff's) being or having been a partner with the defendants in the said business, or which have arisen or grown out of, or which thereafter might arise or grow out of the said business. This provision contains the larger or extended liability of the defendants for the plaintiff, and is clearly confined to the time of the partnership dealings; and, being

a provision to indemnify the plaintiff against his liabilities, if it had been intended to cover all his liabilities whatever, in respect of charters or leases, one would have supposed the words would have been large enough to embrace such intention. I consider this provision in favour of the plaintiff as the larger proposition; and, that this evincing no intention to extend beyond the time of the partnership, we should not extend other words beyond that time, unless there were a clear evident intention of the parties that it should be so. Secondly, the covenant of the defendants, after the general words, says, that *particularly* the defendants shall and will pay Alpheus Jones the price of a steamer purchased by the partnership from him. This particular provision covers the whole liability of the plaintiff in respect of this steamer, as was clearly intended, because it was a partnership debt; but the introduction of one particular, as part of the general words or covenant, would lead to the conclusion that no other particular liability of the plaintiff was intended, but in all other respects the general words would and should include all things the parties intended. Then follows the provision respecting the steamer the plaintiff chartered from Cayley. The defendants first assume the charter for the time unexpired, and agree that they will pay Cayley 360*l.* for the year 1847; and that at the expiration of the charter they should and would deliver the steamer up to Cayley, according to the terms and conditions of the charter, or otherwise account to the plaintiff or Cayley for the value of the boat; and then say, they generally and without exception should and would save the plaintiff harmless, &c. Now, it appears to me clear, first, that the defendants only assumed the unexpired time of the charter; and I think it is but reasonable to suppose the parties intended the liability of the defendants to be but co-extensive with their assumption, so far as the payment of fixed sums was concerned, because there is an express provision for the payment of the 360*l.* for the year 1847, which would have been unnecessary if the subsequent words were intended to protect the plaintiff from his liability for specific rents, no matter when they might

be due. Secondly : it is clear the defendants undertook to deliver the vessel at the end of the charter, according to the terms and conditions of the charter party, which would of course include the repairs, &c., which might be necessary, if any there were, which would be required to be done in consequence of injuries, &c., sustained previous to the defendants' assumption of the vessel ; but the parties, I think, may have supposed there might be something possibly which might not be included in the provision for delivering up the vessel according to the terms of the charter party ; and therefore, to prevent the possibility of any misunderstanding on that ground, they thought it better to insert the general words. This construction gives full effect to the general words, if we apply them to the *corpus* of the vessel. It appears to me more reasonable to hold that this was intended, rather than that it was intended to cover the payment of moneys due by the plaintiff individually, and with and for which the defendants neither had any interest, nor, so far as we see, any value ; and further, so far as we can judge, were ignorant that he did owe. It seems to me more reasonable to hold that the parties intended the general expression to apply to the *corpus* of the vessel, rather than to apply to the payment of fixed or known sums, for this additional reason, that both in the case of the steamer "Favorite," which was chartered, and the other steamer, which was purchased, the sums of money to be paid in respect of them are both named ; and, as the plaintiff must of course have known the precise sum which he owed Cayley in respect of the rent, if it had been intended the defendants should pay it, it would, I think, have been specially provided for, instead of being allowed to be dependent upon the construction of that which is, as we now see, capable of being argued as susceptible of different constructions. Viewing the whole scope of the instrument together, it appears to me this was intended—namely, that the plaintiff should leave the partnership in consideration of a certain sum to be paid him : that all the debts contracted by the partnership, or by, or due by, the plaintiff individually for the benefit of the partnership business,

should be assumed by the defendants: that they should assume the steamer "Favorite" for the year 1847, and should pay Cayley the rent of her for that year; but as the plaintiff had before used and employed the vessel in his own business, and was bound to deliver her up at the end of the charter, according to the terms and conditions of it, that the defendants assumed that responsibility for him generally and without exception as to time when injuries might have been sustained, or as to any of the terms and conditions or obligations thereof as respects the vessel, as distinct from the rent for her use.

BEAVER V. REED.

Case for overflowing land—License revocable at will not assignable.

W. G., owning lot 24, obtained a parol license from the plaintiff (owner of lot 25) to erect a dam across a stream running from lot 25 through lot 24, and thereupon erected a dam, and in further consequence of such license built a mill on said lot, to be worked by means of said dam. The defendant purchased the lot, mill, &c., from W. G., and for the purpose of working the mill upheld the said dam, and thereby overflowed plaintiff's land. Plaintiff brought his action, and defendant pleaded the license to W. G.; and that he (defendant), having purchased the lot, &c., from W. G., for the purpose, &c., upheld the said dam, &c.

Held on demurrer (ROBINSON, C. J., dissentiente,) plea bad:

- 1st, Because the license being coupled with the grant of an easement, the grant not being by deed, was void, and the license consequently revocable:
- 2ndly, Because it was a license, for all that appeared, given to Graham personally, and being revocable was not assignable:
- 3rdly, Because the right to overflow plaintiff's land was claimed as incident to the possession of the mill on lot 24; but the plea did not shew that the right so formed such an incident, either by the manner of its creation or otherwise.

Case for overflowing land.

The declaration stated plaintiff's possession of No. 25, 8th concession Puslinch, across and from which lot there is a stream of water running to and across No. 24, in the 8th concession, Puslinch; that before the erecting of the dam complained of, the water of said stream did run and flow, and of right ought to run and flow without interruption, and by reason of his possession of No. 25 plaintiff should by right have the water run and flow in and across No. 24, in its free, usual, uninterrupted, and natural course: that one W. G. wrongfully erected a dam on No. 24, and defendant wrongfully upheld it, whereby part of No. 25 was overflowed.

Plea: That one W. G. being possessed of lot No. 24, and desiring to erect a mill thereon, and requiring a dam across

said stream on his lot, the plaintiff gave to the said W. G. license and permission to erect on said lot across said stream the mill-dam in question, and W. G., by such license of plaintiff, and *at the cost* of W. G., in consequence of such license, while possessed of said lot, did erect said dam; and in further consequence of such license W. G. erected a mill on said lot at great expense, to be worked by means of said dam; and defendant having acquired said lot, mill, and dam, by purchase from W. G., and being the occupier succeeding W. G., hath for the working the said mill which could not otherwise be worked, upheld, maintained, and continued said dam.

Demurrer: That defendant claims an easement in plaintiff's land without shewing any right, or how he acquired it: that such easement is not stated to have been granted by deed, nor that it was given to W. G. and his assigns, nor shews that plaintiff licensed defendant to uphold the dam; or, if that is meant, leave and license to defendant, and not the evidence of it, should have been pleaded.

Freeman, for demurrer, contended that what the defendant sets up is not a mere license, but he is claiming an easement in the plaintiff's land, which can only lie in grant, and no deed is shewn by which such an interest can pass. He referred to *Wood v. Leadbitter* (a), and *Robinson v. Fetterley* (b).

Van Koughnet, Q. C., contra.—*Wood v. Leadbitter* does not apply. A license to do a thing on a man's own land does not require a writing or deed—*aliter*, if it be to do something on another's land—*Winter v. Brockwell* (c), *Liggins v. Inge* (d). If the dam was lawfully put up, the defendant is not bound to take it down. This is a case of a license coupled with an interest, and therefore irrevocable—*Law Mag.*, No. 68, Aug., 1845, p. 129.

Freeman, in reply—The only interest that can be connected with the alleged license is the interest in the money expended in putting up the dam; defendant upholds the dam, and there is at least no license as to *him*.

(a) 13 M. & W. 838.

(b) 8 U. C. R. 340.

(c) 8 Eas. R. 308.

(d) 7 Bing. 682.

ROBINSON, C. J.—The plaintiff complains that he is the proprietor of land, through which a stream runs down to and through certain other lands mentioned in the declaration; and one Graham having wrongfully erected a dam across the stream on the said land below the plaintiff's land, this defendant aforesaid wrongfully and injuriously continued and maintained the said dam so wrongfully erected by Graham, and thereby occasioned the water of the stream to flow back on the plaintiff's land.

The defendant pleads that Graham being in possession of the land below the plaintiff's, and desiring to erect a mill-dam upon it, the plaintiff at his request gave him leave to erect the dam mentioned in the declaration; that Graham under this leave erected the said dam and put up a mill at great expense: that he the defendant afterwards purchased the said land from Graham, with the said dam and mill thereon, and hath kept up and maintained the said dam, because the same was necessary for the working of his mill, &c.

The plaintiff demurs to this plea as being no defence, for that it amounts to an attempt to set up a title to an easement without any foundation by deed; and because it is an argumentative plea of license by merely setting out evidence without asserting that the plaintiff did give leave, &c.

The plaintiff has taken an exception to the defendant's plea, in point of form, which he did not press upon the argument, and I do not think it is a good objection. The cause of demurrer to which I refer is that the plea sets out evidence merely of certain facts which the defendant relies upon as proving a license in effect; whereas, if they amounted to a license, the defendant should have pleaded a license in the usual form. There are several cases in the books in which the property of the person giving the license has changed after the license was given, and the plea is framed on the same principle as this plea. I have not found one in which the property of the license has changed hands, and when consequently it is not the licensee who sets up the license, but one succeeding to his property.

The same reason, however, must apply in both cases, making the plea special. The defendant in this case could not have pleaded with truth that the plaintiff allowed him to build the dam, or the mill which depended on the dam; nor could he plead that the plaintiff had given him leave to continue a dam which had been wrongfully erected by Graham, because neither would have been true. His defence is that the dam was built by Graham, not wrongfully as the plaintiff alleges, but with the express leave of the plaintiff; that confiding in that leave, Graham had at great expense built the dam, and a mill, which would be useless but for the dam; and that the defendant is now the assignee by purchase of the mill and dam. He maintains that under such circumstances the plaintiff cannot meet him as a trespasser, for continuing the dam erected by Graham with his permission.

As to the substantial part in the case: There are some authorities which seem to determine that in a case like the present the plaintiff must at least have requested the defendant to abate the nuisance before he could treat the continuing it as a wrong; but the defendant contends that it is not in the power of the plaintiff to revoke his license and insist on the dam being removed; and he has rested his case on the want of a request being shewn that he should pull down his dam.

I think the defendant is supported by authority for what he contends for, and that his plea does set up a good defence. There are two distinctions which must be kept in view, otherwise in examining the English authorities there may appear to be an inconsistency in the various decisions, when in truth they are all reconcilable with each other, if the difference of circumstances be attended to. The defendant here is not sued for having done anything on his neighbour's land, but for continuing wrongfully a dam on his own land, which the plaintiff could not complain of unless for the injury which it occasions by backing the water on him. And in the next place the defendant is only defending himself against an action of trespass, by setting up that the erection which the plaintiff complains

of as being injurious to him was put up with his leave, and therefore not wrongfully. If he were plaintiff, and standing upon a right or privilege which he claimed to have acquired on the land of the other party, and were complaining of his right or privilege being obstructed, and claiming damages on that account, then he would be under the necessity of shewing a grant by deed as the foundation of his right, and could not rely on a mere parol license as conferring such a right. If, for instance, Graham had obtained a parol license from Beaver, the now plaintiff, for digging a race-way through Beaver's land in order to bring down the water more advantageously to his (Graham's) mill; and if, after he had dug the race-way and built his mill, Beaver had stopped up the race or turned the water from it, and Graham were in consequence bringing an action against Beaver for this obstruction as an infringement on his right, he would fail, because his action would be grounded on a supposed right to an easement in Beaver's land, and he must shew a good legal title to that easement. In that case he would be relying on the parol license as a proof of a subsisting legal right, whereas in the case now before us the defendant is claiming nothing; but, being sued as a wrong-doer, he sets up the alleged license as a reason why the plaintiff cannot treat him as a wrong-doer. He shews him estopped by his own consent from complaining of that as an injury which was done with his sanction. It is quite true that if a defendant can in such a case protect himself by the parol license against damages, he does undoubtedly establish the right, and if the other party can obtain no redress for the nuisance the effect is the same as if he had made a grant of the privilege, or easement by his deed. This is noticed in several cases, but it is not admitted to be a reason why the defence should not prevail.

The case of *Liggins v. Inge* (a), in my opinion, fully sustains this defence; and *Wood v. Leadbitter* (b) does not interfere with that decision. It was expressly declared by the court in the latter case that they were not denying the authority of *Liggins v. Inge*, and of *Winter v. Brockwell* (c),

(a) 7 Bing. 690. (b) 13 M. & W. 838. (c) 8 Ea. R. 308.

which proceeded on the same principle. They considered that class of cases as perfectly distinct from Wood v. Leadbitter, as they evidently are, for the reason I have mentioned.

This plaintiff in effect rests his action on the right which he has to have the water of the stream flow unobstructed in its natural course through the defendant's land, but he may have precluded himself by his conduct from insisting on that right, by being himself a party to that obstruction. If this plea is no defence, then it would equally be no defence if the defendant had paid the plaintiff a large sum of money for his permission to build his dam ; or if the plaintiff had aided, as perhaps he did, in its construction, or had not merely assented to its being built, but had persuaded and urged the defendant to erect it, which he might in many such cases reasonably do, from a desire to have a mill built in his neighbourhood, which might be a great convenience to himself, and tend to enhance the value of property. According to what the plaintiff contends for, if all or any of these things had taken place, the plaintiff might nevertheless not merely revoke his license, and insist on the defendant pulling his dam down, and on his refusal sue him as a wrong-doer for its continuance, but might sue him at once as a wrong-doer, without any revocation, or request to pull the dam down. The argument is that in resisting this action on the plea of license, the defendant is setting up a right to an easement in plaintiff's land, which right he cannot hold unless by deed ; that if the plaintiff can recover no legal damages for the injury, he is in the same situation in effect as if he had granted the privilege by deed ; and that a party cannot for any purpose, or in any shape, advance a permission to erect what would *prima facie* be a nuisance in his neighbour's land, unless he can shew a deed granting him the privilege. I believe my brothers have formed that opinion ; but I think the law is otherwise, and that the case of Liggins v Inge establishes a clear distinction, which applies precisely in the case, and which distinction is in no degree interfered with by the decision of the court in Wood

v. Leadbitter, nor by the language of the judges in that case. Indeed they expressly declare that their decision had no bearing on that case, nor on *Winter v. Brockwell*, for that these cases proceeded on a different ground, as in fact they do, and upon a ground which it appears to me equally applies in the case now before us. An American commentator on *Wood v. Leadbitter*, in a note appended to the American edition of the report, observes that under any view of the law there would seem to be no doubt that a license will form a valid defence to an action brought to recover damages for an act done before revocation, although of a nature, if continued, to amount to an easement. *Liggins v. Inge* goes further than this, for there Lord C. J. Tindal says :—" We think the operation an effect of the license after it has been completely executed by the defendant is sufficient, without holding it to convey any interest in the water *to relieve* them from the burthen of restoring to its former state what has been done under the license, although such license is countermanded, and consequently that they are not liable to an action as wrongdoers for persisting in such refusal ;" and his Lordship further says :—" This is a license to construct a mill, which is attended with expense to the party using the license, so that after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a license to do something that in its nature seems intended to be permanent and continuing ; and it was the fault of the party himself if he meant to reserve the power of revoking such a license after it was carried into effect, that he did not expressly reserve that right when he granted the license or limit it as to its duration. Indeed the person who authorizes the mill to be erected, becomes in some sense a party to the actual erection of it, and cannot afterwards complain of the result of an act which he himself contributed to effect."

Fentiman v. Smith (a), and *Hewlins v. Shipman* (b), shew the distinction I have adverted to between a case in which the plaintiff is suing for damages for an injury resulting

(a) 4 Ea. R. 107. (b) 5 B. & C. 221.

to himself from an act which he has permitted; and a case in which the person giving the license is made a defendant in consequence of his doing some act on his own land which the other party contends he has disabled himself from doing—not by any deed he has made, but in consequence of a mere verbal license. And what Lord Ellenborough says, in *Fentiman v. Smith*, that the permission not being by deed was a mere license, and revocable at any time, though no doubt correct as applied in that case, if it were meant as an assertion that a license must in all cases be revocable at pleasure, as well when it has been executed at the expense of the licensee as when it has not, would be inconsistent with many later cases, and with every text writer, I believe, that has written on the subject. He doubtless never meant to be so understood, as his own judgment in *Winter v. Brockwell* clearly shews.

I am strengthened in the opinion which I have expressed by the following authorities:—*Aldred's case* (*a*); *Brent v. Haddon* (*b*); *Crabbe on Real Property*, secs. 512, 513, 526; *Wallis v. Harrison et al.* (*c*)—by that passage in Mr. Justice Bayley's judgment in *Hewlins v. Shippam* in which he says:—"Upon these authorities we are of opinion that although a parol license might be an excuse for a trespass till such license were countermanded, that a *right and title* to have passage for the water for a freehold interest required a deed to create it; and that as there has been no deed in this case, the present action, which is founded on a right and title, cannot be supported." I refer also to Lord Abinger's judgment in *Carrington v. Roots* (*d*); to Baron Hullock's judgment in *Harvey v. Reynolds* (*e*); *Cocker v. Cowper* (*f*); *Bryan v. Whistler* (*g*); 3 Stark. Ev. 748; *Doe Foley v. Wilson* (*h*); *Taylor v. Waters* (*i*); *Thomas v. Sorrell* (*k*); *Rex v. Horndon on the Hill* (*l*); *Wood v. Manley* (*m*); *Webb v. Paternoster* (*n*); *Mason v. Hill* (*o*); *Bridges v. Blanchard* (*p*); 2 Saunders, 113 a. b.

(*a*) 5 Co. 57, b(*b*) Cro. Jac. 555.(*c*) 4 M & W. 538.(*d*) 2 M. & W. 248.(*e*) 12 Price, 724.(*f*) 1 C. M. & R. 418.(*g*) 8 B. & C. 288; 2 Man. & Ry. 318.(*h*) 11 East 56.(*i*) 7 Taunt. 374.(*k*) Vaughan, 351.(*l*) 4 M. & S. 562.(*m*) 11 Ad. & Ell. 34.(*n*) Palmer, 71.(*o*) 2 Nev. & Man. 757. (*p*) 3 Nev. & Man. 695.

I consider the case of *Bryant v. Whistler*, as reported in 2 M. & Ry. 318, immaterial to the present question, because there the licensee was attempting to support an action as upon an acquired right—not resisting an action of trespass, which makes all the difference. *Rex v. Inhabitants of Horndon on the Hill* is, in my opinion, inapplicable for the same reason, though not applying exactly in the same way. Lord Ellenborough's remarks on it, that a license was not a grant and could be recalled immediately, could not be meant to assert that all licenses in such cases, whether executed or not, may be revoked, and that such revocation will put an end to its effect for all purposes; because nothing could be more expressly against such a position than his own judgment in *Winter v. Brockwell*; and the current of authority is the other way. In the case, besides, *Rex v. the Inhabitants of Horndon on the Hill*, the person licensed was not resisting an action brought against him for using the alleged license: the question was, whether a legal interest had been acquired under the parol license, such as could confer a settlement under the poor law. It is true that in *Williams v. Morris* (a) the Court of Exchequer intimate a doubt in regard to some of the cases, though not those to which I have chiefly referred: but if they had held in that case that a license to do an act on a party's own land, which may, in its consequences, injure the licensor, could be revoked at pleasure, even after it had been created at the expense of the licensee, so as to leave him liable in trespass or case for the consequences of an act done with permission of the party complaining, I should not have felt justified in following a single decision to that effect in opposition to *Liggins v. Inge*, and the many cases decided both before and after that case on the same principle—still less to reject those decisions in reference to a mere doubt expressed.

It may be said with reason that a man's right to the full enjoyment of his property seems very unsafe, if the right may be, even to this extent, interfered with by setting up proof of a mere parol license; and it might have been on the whole better if the law had allowed no attention to be

(a) 8 M. & W. 493.

given for any purpose to an alleged verbal permission of this kind, but had rejected all evidence less than a solemn instrument under seal ; yet many cases might be stated in which life and liberty, and rights of property of much greater value than are likely to be involved in any question of this kind, are left subject to be affected by oral testimony ; and, at all events, for the purpose of protection against an action, or for a wrong done, the legislature has not in such a case insisted on a written license, nor do I think the common law does. In *Carrington v. Roots*, 2 M. & W. 254, it was held that a contract for the sale of an interest in land, without a note in writing, may operate as a license so as to excuse the entering of the purchaser on the land, though it could not be made available in any way as a contract. There the plaintiff was standing on his parol contract as confirming an interest which he insisted would give him a right of action against the defendant, who had acted in disregard of it. "It would be a different case," they said, "if the plaintiff had been sued by the defendant in trespass. There the argument might have been available in answer to a trespass by setting up a license ; not setting up the contract itself, as a contract, but only shewing matter of excuse for the trespass : " that appeared to them the whole extent to which the plaintiff could avail himself of the contract. If the requisition of a positive statute can be thus relaxed, I think *a fortiori* that principle of the common law can be to the same extent which requires a deed as the foundation of a right to an easement. I believe I have the misfortune to differ from my brothers in my view of this case, and I do so with some distrust of my opinion, because there are many dicta to be met with in the adjudged cases, that if taken literally and applied indiscriminately, without reference to the facts of the case under consideration, would shew my view to be untenable, and would equally shew the judgment in *Liggins v. Inge*, and in many other adjudged cases which have to this moment stood unquestioned, to be against law. But I have met with no decision which, in its effect, when the circumstances are attended to, seems to me to be at variance with the conclusion I have come to.—Addison on Contracts, 85-6.

The case of *Andrews v. Adams*, reported in 15 Jurist, 149, does not, I think, conflict with *Liggins v. Inge* and that class of cases, though it was cited as establishing a contrary doctrine. It resembles the present case, however, in an important particular, in which most of the other cases cited differ from it. In that case the person licensed was not, any more than in this case, setting up the alleged license as conferring upon him an actual legal title to an easement *in alieno solo* : he was not, as plaintiff, claiming under his license a real interest which he sought to enforce ; nor claiming damages for an interference with such supposed legal interest.

He was merely, as in this case, defending himself against a claim made upon him for damages as a wrong-doer. In that respect the two cases are alike ; and it is also true that in that case the license was held to be inadequate to protect the defendant, and upon the principle that an easement in another person's land could not be granted by deed. That was not the principal point in the case, however, which was decided on technical points of pleading ; but the effects of a license as a defence was raised in the case and was discussed at the time, and disposed of in the judgment of the court. The plaintiff had declared that he had of right a certain pew in the parish church, by reason of his inhabiting a certain dwelling house ; but the defendant unlawfully without his leave entered into the pew during divine service, and disturbed him in the enjoyment of it, for which he claimed damages. The defendant, in a special plea, set forth a special agreement between plaintiff and defendant and another person, then church-warden of the parish, by which the plaintiff, having a larger pew than was necessary for him, allowed the church-wardens to partition off the pew into two parts, and to occupy one of the parts so divided ; and alleged that they did so divide the pew at some expense, and did the act complained of after and in pursuance of that agreement, and of the license thereby given to them. The plaintiff, in a replication to this plea, which replication was held bad in point of form, set forth, among other things, that as to a part of the trespasses complained of, the license

in the plea mentioned was revoked before they were committed. It was contended on the argument that the license could not be revoked after it had been acted upon and expenses incurred, and for that the counsel relied not on *Liggins v. Inge*, or *Winter v. Brockwell*, but on *Wood v. Leadbitter*, I suppose as admitting that principle by implication. The counsel on the other side insisted that the right to a pew can only be claimed as appurtenant to a messuage, and therefore that the license would be revokable notwithstanding the church-wardens had incurred expense in erecting the partition; and the license, he said, could only be an answer to an action for anything done under it, so long as it remained unrevoked.

Mr. Justice Patteson, in delivering the judgment of the court, says no more than this in relation to that point of the case:—"A further question arose in the course of the argument, as to the right of the plaintiff to revoke the license or agreement. The law on this subject is elaborately and conclusively laid down in the case of *Wood v. Leadbitter*, 13 M. & W. 838, and it is clear that, as there was no deed in this case, and therefore no grant, the plaintiff might revoke the license, notwithstanding the expense the defendant had incurred, unless the defendant's character of church-warden makes any difference, (which, under the pleadings, he did not think it did.) And this being so (his lordship said) the *rule of law, as laid down in Wood v. Leadbitter, must apply.*" Now we must consider that in the case of *Andrews v. Adams* the defendant was not justifying anything done on his own land, but was insisting on a right to enter into, and remain on the plaintiff's premises—as in *Wood v. Leadbitter*, the plaintiff was claiming a right under a verbal license to go into, and remain on Lord Eglinton's premises—the cases are similar in principle, and are like *Cooper v. Barber* (a), *Hewlins v. Shippam*, and many other cases; but clearly distinguishable from *Liggins v. Inge* and *Winter v. Brockwell*, and that class of cases, where the defendant is complained of, not on the ground of his having directly

(a) 3 Taunt. 99,

entered on the plaintiff's land, which in its consequences only was injurious to the plaintiff. The Court of Queen's Bench, in deciding in *Andrews v. Adams*, profess only to act upon the rule in *Wood v. Leadbitter*; and there the Court of Exchequer, which gave the judgment in *Wood v. Leadbitter*, expressly declare that they had not adverted to the case of *Winter v. Brockwell*, or *Liggins v. Inge*, or that class of cases, because they were decided on grounds inapplicable to the case of *Wood v. Leadbitter*, then before them, and were admitted not to bear upon it. Nothing therefore can be clearer than that the decision in the late case of *Andrews v. Adams* was not considered or intended by the court to overrule the case of *Liggins v. Inge*, or to conflict with it in any degree.

I see no ground for any solid distinction between the case now before us and that of *Liggins v. Inge*, which appears to me fully to cover this case; and I have not found the authority of *Liggins v. Inge* questioned, so far as anything laid down in it was necessary to the decision of that case, or of the present.

Besides, no revocation of the license is alleged in this case. The plaintiff claims damages from the defendant as a wrong-doer, and because he keeps up a dam which had been erected by the former proprietor in the land which is now the defendant's. *Prima facie*, the defendant could place any erection he pleased on his own land, or keep it up as long as he pleased, as was said by Mr. Justice Lawrence, in *Cooper v. Barber*, 3 Taunton, 110:—"He may pen the water as he will, till he does a damage to his neighbour; but the law is that he must so use his own as not to prejudice his neighbour."

Therefore this plaintiff was driven to shew why he complained of this dam, and his allegation is that it obstructs the natural flow of the stream through the defendant's land and occasions the water to run over upon his, the plaintiff's land. The alleged wrong is the obstructing the flow of water through the defendant's land, of which the damage to the plaintiff is the consequence.

The defendant's answer is that thus interfering with this

run of water through his own land is not a wrongful act on his part of which the plaintiff can complain, although it may in its consequence be injurious to him, because the person who built the dam and the mill had the plaintiff's leave for doing it, in order expressly that the water might be received by it for the purpose of working the mill; and therefore, if it do occasion him damages, it is *damnum absque injuria*. To shew such a license he requires no deed, for he is not claiming directly an easement in the plaintiff's land, but answering himself for the consequences to the plaintiff of a continued obstruction existing in defendant's own land.—Selwyn's N. P. 1143, 9th edition; Crabbe on Real Property, sec. 526.

It makes no difference, I think, where the license has been executed in a manner attended with expense, that it is not the original licensee who sets up the defence, but his assignee, for the latter could be no more compelled to pull down the dam than the former. Whether the plaintiff in such a case as the present could or could not revoke the license, and after such revocation claim damages if the nuisance were not abated, it is not necessary in this case to consider, for no revocation is alleged.

The weight of English authority, I think, is against the power to revoke, at least without tendering a re-imbursement of the expense incurred in erecting, with the permission of the party, a work intended to be permanent; but there are dicta the other way, and doubts thrown out whether the language of Chief Justice Tindal in the case of *Liggins v. Inge* does not in that respect go farther than is warranted. I believe it has been held in some of the courts of the United States that on principles of common law the license is revocable.—“Kent's Commentaries License.”

We had in this court lately a case of *Robinson v. Fetterly* (a), in which the effect of a parol license in a case precisely like the present was dismissed on a motion for a new trial, but as the alleged license was not made out in evidence, the court on that ground decided for the plaintiff. I think the judgment in this case should be for the defendant on the demurrer.

(a) 8 U. C. R. 340.

DRAPER, J.—I do not think the plaintiff in his declaration is to be treated as asserting any right or easement in or over the lands of the defendant, when he says that the water of the stream which flows through his land into and across the defendant's lands should flow without interruption in its natural course. He is asserting a right arising *ex jure naturæ* incident to his proprietorship of his own lot, not claiming an easement *in alieno solo*, and the right he asserts is of a character which would not be extinguished by unity of possession. He asserts this right merely by way of inducement to the injury of which he complains, which is an overflowing of his lands by the defendant's act in keeping up a dam, previously erected on No. 24 across the stream. The overflow of the land of the plaintiff is justified by the defendant, who distinctly claims a right so to keep the water raised. He thereby in effect asserts a right to be exercised upon and over plaintiff's land. The plaintiff is not complaining of any injury done to his right in the water of the stream, or to his right to have it flow by and through its natural boundaries and channel. His cause of action is the injury to his land; and if the stream did not cross the plaintiff's land at all, but came through a channel over other lands to defendant's, and was there penned back by a dam erected by defendant so as to overflow the plaintiff's land, he would have precisely the same right and form of action, declaring on the possession of his land. The inducement seems to me inapplicable to the injury subsequently complained of, for the former refers in strictness to the right to the flowing water of the stream, which right is not shewn to be invaded; the latter, to the plaintiff's enjoyment in his own land, not being part of the watercourse as usually or naturally covered by its waters, and the plea claims a right so to interfere, admitting the plaintiff's ownership.

The right so claimed is in the strictest sense of the word an easement; which, as an incorporeal hereditament, could not pass without deed, and is defined in *Terms de la ley* a privilege that one neighbour hath of another by charter or prescription, without profit.

Where there is a license by parol, coupled with a grant or pretended grant of something which is incapable of being granted otherwise than by deed, then it is a mere license ; it is not an incident to a valid grant, and therefore is revocable.

This seems to me to be the case here ; and besides, it was only a license to G. No license to defendant is pleaded, and none is to be inferred from a parol license to G.

The case of *Fentiman v. Smith* is very much in point for plaintiff. The plaintiff complained of defendant's obstructing a tunnel built on defendant's land, through which water passed to defendant's mill. The tunnel had been built at plaintiff's expense, by parol agreement with defendant, who had even assisted in its erection, and afterwards refused to assent to its continuance. Lord Ellenborough held that the title to have the water thus flow over defendant's land could not pass by parol license without deed ; that such a title was revocable at any time, and clearly gave no title in point of law. The case of *Rex v. Horndon on the Hill*, where a parol license to enclose a garden from a common, was held revocable immediately, although it was urged the party had gone to expense in the enclosing, confirms the same view.

Hewlins v. Shippam is not to be distinguished from *Fentiman v. Smith* in principle ; and Bayley, J., after citing it, states, " that although a parol license might be an *excuse* for a trespass till such license were countermanded, that a right and title to have passage for the water for a freehold interest required a deed to create it." And in reviewing *Webb v. Paternoster*, *Wood v. Lake* (a), and *Taylor v. Waters*, he says they were not cases of freehold interest ; and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed. His observations upon the case of *Winter v. Brockwell* are more important to this case, because they appear at first to favor the principle involved in this defence. In that case the plaintiff complained that being lawfully possessed

(a) Sayer, 3.

of a dwelling house, &c.; into which light and air entered by means of a window from an area between said window and an adjoining house, by means of which area also noisome smells which came from the adjoining house evaporated, defendant wrongfully placed a skylight over the area above plaintiff's window, by means of which the light and air were prevented from entering plaintiff's window into his house, and the noisome smells were prevented from evaporating, and entered plaintiff's house. Not guilty was pleaded; and the defence was, that the area, which belonged to defendant's house, had been covered by a skylight as stated with the express consent and approbation of plaintiff obtained before it was done, who also gave leave to have part of the frame work nailed against his wall. After it was finished plaintiff objected to it, and gave notice to have it removed. Lord Ellenborough was of opinion that the license given by plaintiff having been acted on by defendant, and expenses having been incurred, could not be recalled—at least, not without putting defendant in the same situation as before, by offering to pay all the expense, and defendant had a verdict. A motion was made for a new trial, and Lord Ellenborough said that he had looked at *Webb v. Paternoster*, Palmer 71, which decides that a license executed was not countermandable, but only where it was executory, and the rule was not granted. Bailey, J., remarks on this, "that was not the case of the grant of an easement to be executed on the grantor's land, but a permission to the grantee to use his own land in a way in which, *but for an easement of the plaintiff's*, such grantee would have a clear right to use it.

Bryan v. Whistler shews, that though money be paid for an easement, and expenses incurred upon it and to use it, a deed is necessary to pass it.

But the most instructive case is that of *Wood v. Leadbitter*, 13 M. & W., in which the cases have been elaborately reviewed and commented on, and the difference between a mere license and a license coupled with a grant, is clearly pointed out. A mere license is revocable—and this, whether it be by parol or under seal; for a license

properly passeth no interest, nor alters nor transfers property in any thing, but only makes an action lawful which, without it, had been unlawful. But a license *coupled with a grant* is irrevocable, and a parol license equally so with one by deed, provided that the grant is of something which may be granted without deed. "But where there is a license by a parol coupled with a parol grant of something which is incapable of being granted without deed, there the license is a mere license—it is not incident to a valid grant, and is therefore revocable."

Now, if the present plaintiff had cut a drain on his own land in such a way as to draw off the water which overflowed his land, without drawing off the water from its channel within and between the natural banks of the stream (which may probably pass through plaintiff's land before it reaches defendant's) it is clear that no action would lie against him for that act, although its effect would be to render valueless the defendant's mill, because there was only a parol license to erect the dam; for the license would be, in its very nature, coupled with a grant of an easement over the licensor's land, viz., to overflow it; which grant not being by deed was void, and the license would consequently be revocable.

The case of *Wood v. Leadbitter* is referred to, and confirmed by the Court of Queen's Bench in *Andrews v. Adams* (a). The court—speaking of a license or agreement on the part of the plaintiff to or with the defendant, that the latter might divide a pew in a parish church belonging to plaintiff, and might enter and occupy a portion so divided off—remark, "It is clear that there was no deed in the case and therefore no grant; the plaintiff might revoke the license, notwithstanding the expense the defendant had incurred." This last case resembles the present in one feature in which the other authorities cited differ from it—namely, that the party through whose license the expense was incurred and the act done is the party who complains that his rights are infringed by those who incurred the expense and did the acts, the latter of which are the subject

(a) 15 Jur. 149, and 15 Q. B. 284.

of the suit, and were done after the license was revoked. I refer also to the late case of *Taplin v. Florence* (a), and *Perry v. Fitzhowe* (b).

Winter v. Brockwell and *Liggings v. Inge* are the leading cases of a class most apparently at variance with the conclusion at which I have arrived. I might perhaps content myself with saying that this case does not fall within the principle of those decisions, which I think goes no farther than to establish that a parol license may extinguish an existing easement over the land of the licensor. In *Wood v. Leadbitter* the court say, "We do not advert to the cases of *Winter v. Brockwell* and *Liggins v. Inge*, or other cases ranging themselves in the same category, as they were decided on grounds inapplicable to the case before us." Both those cases resemble the present, as they did the cases of *Wood v. Leadbitter*, *Andrews v. Adams*, *Rex v. Horndon on the Hill*, *Cocker v. Cowper*, and others before cited in this respect, that the parol license had been acted upon and expense incurred by the license; and both differ from the present case in the nature and character of injury which was complained of. They both resemble the present case in this respect, that the act licensed to be done was an act to be done upon the soil of the licensee, for which (not referring to the consequences of the act) no license was necessary: and both differ from the present case in this, that in them the consequence of the act was only to deprive the licensor of an easement which he might otherwise have of right enjoyed; whereas in this case the consequences of the license is to confer on the licensee an easement to be enjoyed in and over the land of the licensor. In giving judgment in *Liggins v. Inge*, Lord Chief Justice Tindal guarded himself most carefully from being supposed to decide that a parol license would convey an easement. He admits, that if it were necessary to decide that a right or interest in any part of the water of the stream—which would in its natural channel and course flow from the defendant's mill to the plaintiff's, and which had been diverted by defendant—passed from plaintiff's father to defendant by

(a) 15 Jur. 402. (b) 8 Q. B. 757.

the parol license of the plaintiff's father, the court would be met by the rule of the common law relative to grants of incorporeal hereditaments, or by the Statute of Frauds relative to interest in land, and says, "It cannot be denied that the right to the flow of the water formerly belonging to the owner of the plaintiff's mill could only pass by grant as an incorporeal hereditament:" from which I certainly infer, that, if the defence could not have been sustained without holding that the defendant acquired that right to the flow of water, it must have failed, because there was no grant. But he goes on to state the ground on which the court think the defence maintainable. And it is not because the plaintiff is considered as *quasi* estopped by his license, or because he is plaintiff complaining of the consequence of an act authorized by himself, as causing him damage. The reason given may be founded on a subtle distinction, but it is nevertheless appreciable—"We think the operation and effect of the license, after it has been completely executed by the defendants, is sufficient, without holding it to convey an interest in the water, to relieve them from the burden of restoring to its former state what has been done under the license, though such license is countermanded. We do not consider the object, and still less the effect, of the parol license to be the transferring from plaintiff's father to the defendant any right or interest whatever in the water, which was before accustomed to flow to the lower mill; but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted such water no longer for the purposes of his mill; that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir which he then consented should be erected by defendant." I am unable to see how this language and this distinction can apply to the present case, where the injury complained of is the continued overflowing of the plaintiff's land; or how the defendant can justify this act, under the license pleaded, without treating the license as transferring to him a right over so much land as he overflows; or how the plaintiff's license, in this case, can be treated simply as an acknowledgment analogous

to that spoken of by C. J. Tindal, in regard to water which never had flowed on to the plaintiff's land, so as to give him the actual usufruct of it. Here the defendant claims a right over plaintiff's land to overflow or occupy it with water. This is an easement which requires a grant at common law, or an interest in lands which requires a deed or writing under the Statute of Frauds. And therefore I think this case distinguishable from these or other cases ranging within the same category, as the Court of Exchequer also considered *Wood v. Leadbitter*.

It therefore appears to me clear that the plaintiff might revoke the license in this case, and after having revoked it, might bring this action. So far, therefore, as that question affects the decision of this demurrer, I think the plaintiff should succeed; and if the defendant shewed a license to himself, we should have to decide whether a revocation before action brought should not have been replied, and that the license before revocation would form a valid defence.

But this plea shews only a license to Graham, and there is nothing shewn to transfer the license to Graham to this defendant. The principle of *Wallis v. Harrison* is applicable here, and entitles the plaintiff to judgment. The plea admits the injury complained of as consequential to the upholding the dam, and justifies the upholding because the plaintiff licensed Graham to build it—not averring anything to shew the license extended to any one but Graham, and treating such license as vesting in himself as purchaser and occupier of the lot No. 24 from Graham, without shewing that it (i. e. the license) was transmissible; and if so, that it was in fact transferred and conveyed to himself. I do not suppose that the facts would enable the defendant to amend his plea, for I do not suppose he could shew more than what he has pleaded—viz., a permission to Graham to erect the dam on his own lot No. 24; that Graham did erect it, and was at considerable expense in erecting it; that defendant has succeeded Graham in the ownership and occupation of No. 24, and that plaintiff's lot No. 25, is, in consequence of the dam, overflowed and damaged. They shewed no more than a license to Graham to do an

act which inevitably affecting plaintiff's land—must be considered a license coupled with a grant; the license and grant being at least co-extensive in duration, as we must infer, with Graham's occupation of the premises, which might be for his life. It is therefore a grant in the nature of freehold of an easement over plaintiff's land, created without deed, and therefore void; and then the license—being coupled with a void grant—is a mere license, and revocable as against Graham, and not assignable; for, disconnected with any valid grant, there is nothing to shew it more than a personal license.

And, in speaking of the alleged consent of the plaintiff to Graham as a *license* to do an act on his own land, the terms used rather tend to a confusion of ideas. Speaking abstractedly, there was no necessity for Graham to obtain a license to erect a dam on lot 24, of which he was owner. He only required a license to do the act when it began to affect lot No. 25. It was to overflow a part of that lot for which he wanted permission, not simply to erect a dam on his own; for if he did not overflow any land but his own, the plaintiff's assent would be a mere nullity, for the plaintiff had no interest or right in the land affected by the erection. To make it a license given by plaintiff, it must be a license to do an act which would affect some right or interest possessed by plaintiff. And this is the use to which it is sought to apply it—for it is pleaded as affording a justification to a right to be exercised over plaintiff's land—viz., covering it with water. Such a license would not be appurtenant to lot No. 24, nor yet to the mill. Assuming it to have been legally granted and irrevocable, it must also be legally transferred before the defendant could avail himself of it. But the defendant only pleads that he has acquired No. 24 and the well and dam [so erected thereon by purchase from Graham, and is the occupier thereof, succeeding him; and, because the mill could not otherwise be worked, justifies upholding the dam. He seems in fact to claim the right as incident to the possession of the mill, because the plaintiff gave Graham a parol license which was executed. I think the plea bad on three grounds:

1stly—that the license being coupled with a grant of an easement, that grant not being by deed is void, and the license is consequently revocable, although expense was incurred in executing it; 2ndly—that being a revocable license, it was also a license, for all that is shewn given to Graham personally, and it ceased when Graham ceased to occupy the property; 3rdly—that the right to overflow plaintiff's land is claimed as incident to the possession of the mill on No. 24, but the plea does not shew the right to form such an incident, either by the manner of its creation or otherwise.

BURNS, J.—The defendant in this case does not answer the plaintiff's allegation that the water was caused to flow over the usual and natural banks of the stream, and that it flowed over and flooded the plaintiff's land, and destroyed his trees, fences, &c., in any other way than by stating that the plaintiff sanctioned the building of a dam by Graham on Graham's own land for the purpose of working the mill. The plea is artfully framed, to avoid if possible any conclusion which might be drawn that the defendant expressly claimed any interest in or easement over the plaintiff's land; but, unless in truth it does amount to something of that kind, it is no answer to the action. Graham had a perfect right to build as many mills and as many dams on his own land as he pleased; and so long as they occasioned no injury to the plaintiff, he could not complain. It would be insensible to suppose that it was necessary for the plaintiff to give his consent to Graham to do that which required no consent, and to do what he had a right to do; and therefore we must understand the plea as justifying what the plaintiff complains of—namely, an injury to the plaintiff's lands, by reason of the mill-dam raising the water upon those lands; and we must understand the defendant to say the plaintiff cannot complain of that injury because Graham had a license from the plaintiff to do that which caused him the injury. If the plea is then to be considered as a justification of the injury complained of, it amounts to the setting up of a right to overflow the plaintiff's land by the plaintiff's own consent; and this, I think, is the proper footing upon

which to place the plea ; for if not considered in that way, it is no answer to the declaration.

The proper way, then, to consider it is in two points of view : first, whether the plaintiff could have maintained an action against Graham, notwithstanding the permission which he had given : and secondly, whether, if Graham could successfully resist the action, can the defendant do so ?

If the action were against Graham, it probably would be found necessary, to a plea of leave and license given by the plaintiff, to shew that it was revoked before the action brought ; because, before revocation, Graham could not, perhaps, be said to be a wrong-doer ; at all events, until a revocation the plaintiff could not be entitled to damages, though perhaps he might be able to maintain his action strictly, were it necessary to do so to save his right as against the Statute of Limitations, and if necessary to shew such revocation, it would come by way of replication.—The facts, as shewn on this plea, are—that the license was executed, and that Graham incurred great expenses and outlay, and that it was not competent for the plaintiff to revoke after that. This involves the consideration in what light the plaintiff's act is to be looked upon, and how to be treated, and whether it confers a right on Graham, or only disables the plaintiff from suing in the face of his own license. 1stly, What right was conferred on Graham ?—The right to overflow plaintiff's land was an easement, an interest in it, and it could no less amount to that because what Graham was to construct was to be on his own land ; and if the effect of what he was to do on his own property was to create a permanent right to overflow the plaintiff's land in order that he might employ his erections fully, it was no less an easement for that purpose than it would have been to cut a ditch or drain for the purpose of using the water to better advantage. If then it was an easement, no interest could be gained but by deed. Suppose the plaintiff in this case, after Graham had built the dam and erected the mill, had thought fit to divert the surplus water which overflowed his land through some other channel, and that Graham could not have worked his mill, would

Graham have been permitted, by means of the parol license, to maintain an action against the plaintiff? I take it to be clear that in such case no action could have been sustained; and if so, that must prove that no interest was conveyed to Graham in or over the plaintiff's land, or passed by the plaintiff's license to Graham to build a dam on his own land. What is said by Mr. Justice Bayley, in *Hewlins v. Shippam*, is this: *that though a parol license might be an excuse for trespass till such license were countermanded, a right and title to have a passage for the water is a freehold, which requires a deed to create it.* I can see no distinction between a right and title to have a passage for water to flow through land, and a right and title to back the water upon the same land higher than it would naturally flow. I take it to be clear that the parol license of the plaintiff conferred no right upon Graham to an easement to overflow the plaintiff's land.

If no right was conferred upon Graham, then, secondly, did the plaintiff's license deprive himself of suing Graham in consequence of the injury? I mean by this to take it as if no revocation could be made in consequence of the license having been executed; but this seems to me, after all, only the previous question in another shape. Putting aside the position of title acquired by occupancy or length of time, or discontinuance of possession, which would bar the proprietor, can the owner of a freehold deprive himself save by deed from the title to it, or the right to bring an action in respect of it—that is, where no tenancy exists? If the plaintiff were prevented from sustaining an action, this inevitable result must follow, that the license would gain title by lapse of time, supposing both the licensor and licensee to live and occupy for twenty years. Many cases shew that a proprietor, though no damage can be shewn to have been sustained by him in consequence of the act of another, may maintain an action upon the bare right, if such right would be lost by twenty years' use or occupancy of something which would interfere with his right. It is not because the plaintiff may have sustained no injury, or that if he does sustain an injury by reason of his own

license to another to do an act which produces the injury, that he therefore loses his right in his land, or altogether loses his right to sustain an action for asserting his title to it. To prevent a plaintiff from bringing an action, is setting up the doctrine of an equitable estoppel. Now, though some American authorities favor that view, and some, on the other hand, are against it, I find no English authority which supports that position; but on the contrary, *Wood v. Leadbitter*, and *Andrews v. Adams*, fully decide, I think, that because one party has gone to expenses in consequence of the permission of the other, that of itself will not prevent an action being brought. When it is said that a parol license is not revocable when it is executed, it must be understood in the sense expressed in the judgment of the court in *Wood v. Leadbitter*, where the whole of the previous cases were reviewed, and it is said: "a license by parol coupled with a grant is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol coupled with a grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license—it is not an incident to a *valid* grant, and it is therefore revocable."—*Winter v. Brockwell*, and *Liggins v. Inge*, exemplify the principle. In these cases the plaintiffs claimed no interest in or on the soil or freehold of the defendants, but claimed an easement to themselves in respect to their own property, and the defence was that they had waived the right to enjoy that easement and induced the defendant to go to expenses in consequence of the permission given. The license or permission given required no grant by deed, and having been given by parol and executed could not be revoked, and the plaintiffs were prevented from sustaining any action. It is true that something was said in *Wallis v. Harrison*, giving countenance to the position that there was a distinction between executory and executed licenses in cases where it would require a grant by deed, but it was not necessary to decide the point, as Baron Parke says; and this matter certainly was most deliberately con-

sidered in *Wood v. Leadbitter*, and that case was approved by the court of Q. B., in *Andrews v. Adams*. In this case, however, it is different; the defendant claims a right to overflow the plaintiff's land, and he makes this claim on a parol license that Graham might build a dam to work the mill. The defendant can no more deprive himself of his interest in his lands without grant by deed than Graham could acquire such interest without deed.—*Wallis v. Harrison* shews that if the plaintiff here had conveyed his land, his vendee would not be bound by his promise; and I take it the same result must follow if the land had descended—viz., that the heir would not be bound. This shews that the license is not irrevocable; and if not irrevocable, I see nothing in the cases which hold that the plaintiff could not himself revoke as well by other means as by selling the property. If the defendant cannot divest himself of his freehold interest in his land without deed, but retains a right to complain of his being prevented from using it to the best advantage, then is there in this case a revocation, or circumstances which are equivalent to it. If the action had been against Graham, as before observed, and he had pleaded leave and license, it might have been necessary, if the plaintiff could not deny; then that he should shew the license had been revoked; but the action now is against a person to whom the plaintiff gave no license, and though the plaintiff did give Graham permission to overflow his lands, the question is, whether that permission is to be extended to the defendant by Graham's act, without the plaintiff being a party to it. And here again arises the question whether it is an easement or a mere license. A mere license is founded in personal confidence and is not assignable, but if coupled with that which is an easement, then it is more—it is a liberty, privilege, or advantage in land. Now it seems to me if the owner has given a license by parol only in or over his land, which is determined upon his granting his land, and that the vendee is not bound, it proves that it is no easement, but a personal license, which does not bind the land. The license rests merely in personal confidence

between the two parties; and if so, I see no principle which admits that one party can transmit such a confidence by selling his land more than the other can by selling his. I can see no principle which should admit that Grahame could sell his property to the defendant and thereby transfer to him that confidence which it must be admitted would end if the plaintiff had sold his land without a reservation. I have before endeavored to prove that the defendant's claim, if it is available, amounts to claiming an easement over the plaintiff's land, and this I think must have its origin by deed, as no right to prescription is here set up; and I have also endeavoured to prove that as against Graham the plaintiff would not be prevented from revoking, and again asserting his right; and if these positions be true, then it is a mere license, amounting to a personal license not assignable, and the defendant cannot stand in Graham's shoes and claim what he might have done—viz., that a revocation should be shewn before action brought. The personal confidence not extending beyond Graham, the defendant, the moment he acquired the property, became as against the plaintiff a wrong-doer.

This may be a hardship upon Graham, and operate restrictively upon the enjoyment of his property, but it is only one of many cases we see taking place every day—viz.; that parties rest on the verbal understandings and contracts of persons, who afterwards take advantage of them. As Mr. Justice Bayley said, in *Bryan v. Whistler*, "I am extremely sorry that an individual in the situation of the defendant' having received a pecuniary compensation for the grant of a privilege intended to be binding, at all events during his own incumbency, should afterwards keep the money, and recede from his undertaking. But if the question of law be with him, his defence to this action must prevail." So long as we sit as a court of law, I can discover no reason, and certainly no English authority, why, in a legal suit, we should recognize defences on the ground of equitable estoppel. If the action were of an equitable nature, as some actions are said to be then, indeed, an equitable defence might be admitted; but in a purely legal

action, as this, it must be decided upon legal principles ; and I see no legal principle which prevents the plaintiff from bringing an action for an injury to his lands, resulting from an injury done which he sanctioned, but in law was not bound by, when that injury is a permanent one, and the causing of which arises from a claim of an easement for which no deed has been granted. And, as the action is not against the person to whom the authority was originally given, the question of revocation does not arise ; because, I think, the defendant cannot derive any benefit from it, not being assignable by the sale of the land.

Judgment for plaintiff on demurrer.

DOE DEM. KERR & KERR v. SHOFF.

Ejectment—Non-production of consent rule—Cognovit—New trial.

Plaintiffs at trial were non-suited for not confessing lease, entry, and ouster. Subsequently to the trial defendant executed a cognovit.

Held per Cur.—on motion for a new trial—that defendant's having confessed judgment was a waiver of any formal exception he might have ; and, moreover, that it was not necessary for the lessor of the plaintiff to produce the consent rule at the trial.

When this case was called on, the defendant's counsel refused to confess lease, entry, and ouster ; and plaintiffs were non-suited.

The defendant moved to set aside the non-suit, on the ground that the consent rule attached to the nisi prius record was not signed by the clerk of the crown and pleas ; but by his deputy, in the outer district.

In answer to this rule the plaintiff's attorney filed an affidavit, that the defendant had executed a confession of judgment in this case ; and he annexed a copy. It appeared to have been signed on 31st of May, 1851, after the assizes ; and was a regular confession *relicta verificatione*.

Wilson obtained a rule nisi for a new trial, on the ground that the consent rule was not signed by the clerk of the crown in Toronto, but by his deputy at London.

J. Duggan shewed cause by filing an affidavit that since the assizes defendant had executed a confession of judgment ; a copy of which was annexed.

Wilson, contra—If deputy can sign blank rule, he can sign

blank writ. The subsequent giving of the cognovit cannot affect what took place at the trial.

ROBINSON, C. J., delivered the judgment of the court.

We should not now interfere after the defendant has confessed judgment, for there can be no more complete waiver of any formal exception that he might be supposed to have, by reason of the non-production of the consent rule at the trial. But the cases of *Doe dem. Fleming v. Armfield* (a); *Doe Burnham v. Lever* (b); and *Doe Greaves v. Raby* (c), shew that this rule should not at any rate have been made absolute.

The consent rule need not be produced at the trial, unless when there is some question as to what premises are defended for. The defendant having pleaded, and his name being on the record as defendant; he admits that he has done what is necessary to entitle him to defend; the plaintiff at the trial has a right, without producing any rule, to call upon him to confess, and, if he does not, the non-suit follows of course. In the case referred to, no consent rule had been drawn up, so that the irregularity in that respect was at least not less than in the present; and yet the court said the nonsuit was proper, and the only effect would be, that the plaintiffs would get no costs, as there was no consent rule and nothing to tax any costs upon. If the defendant in that case had any claim to the premises, the court said he must bring a cross ejectment. Here it seems clear there was no defence intended, for the defendant has confessed judgment since the assizes.

Per Cur.—Rule discharged.

IN RE SAMS V. THE CORPORATION OF TORONTO.

Authority of Judge in Practice Court—Construction of 12 Vic., ch. 81, sec. 155. Judge in Practice Court has no authority to entertain an application for quashing the by-law of a corporation.

As to titles of city corporations under 12 Vic., ch. 81, "Corporation of Toronto" insufficient to designate the corporation of the City of Toronto.

By 12 Vic., ch. 81, sec. 155, corporations have *not less than eight days* to answer a rule nisi for quashing any of their by-laws. Therefore, a rule granted and served on the first Saturday in term is not returnable within that term.

Mr. *Phillpotts* obtained this term, in the Practice Court, a rule nisi for quashing a by-law of the City of Toronto

(a) 1 Dow. N. S. 327. (b) 13 M. & W. 688. (c) 2 B. & Ad. 948.

restraining persons from keeping shops in the city for vending butcher's meat.

The rule nisi was issued from the Practice Court, and made returnable in full Court here—being moved as in the Queen's Bench.

C. Gamble objected, in shewing cause, that the rule and papers were improperly intituled as in an application against "The Corporation of Toronto," there being no such corporation—that they ought to have been intituled as against 'The City of Toronto.'

2ndly. That the corporation could not be called upon so soon to shew cause against the rule, which was only granted on the first Saturday of term, and served on the afternoon of that day, and which therefore the corporation could not be required to answer during the term, there not being a full eight days left, to which they are entitled by 12 Vic., ch. 81, sec. 155 ; that clause provides, "that upon proof of service of a rule upon the corporation to shew cause, *within not less than eight days after such service,*" the court may order any by-law to be quashed if illegal. He cited *Webb v. Fairmaner*, 3 M. & W. 473 ; *Pellew v. Inhabitants of Wonford*, 9 B. & C. 134.

ROBINSON, C. J., delivered the judgment of the Court.

When the rule nisi was spoken to before us in term, it seemed to us questionable whether we could regularly proceeded in such a case upon a rule nisi granted out of the Practice Court, which point we are bound to consider, although no objection has been taken on that ground.

On looking at the 155th clause of 12 Vic., ch. 81, 13 & 14 Vic., ch. 64, and the 9th clause of 12 Vic., ch. 63, and the 3rd clause of 13 & 14 Vic., ch. 51, under which the Practice Court sits, we do not think that such an application can regularly made in that court. The jurisdiction in such cases is, by ch. 81, conferred on the Court of Queen's Bench, or Common Pleas, and we think authority is not given by the statutes to a judge of either court sitting in the Practice Court to entertain an application of this kind not being a matter ordinarily determinable on motion, and the rule nisi asked for in such a case not being a rule or

order in any cause or business "depending in either of the said courts."

If we are right in this respect, it is of no consequence to consider the objections that have been made to the rule nisi. So far as any entitling may be necessary, I think the one adopted in this case would be improper, because "the Corporation of Toronto," is not only not the name of the corporation which passed this by-law, but it is a name no more applicable to it, for all that appears, than it is to the Corporation of the Township of Toronto.

We apprehend also that the defendants could not, at any rate be compelled to shew cause on the last day of term, independently of an objection to taking a special argument on that day, for we think the words "within not less than eight days after service," mean the same thing as saying that the corporation shall have eight days *at least* to answer the rule; and they have not that, if being sued on one Saturday, they are compelled to answer on the next Saturday. They would only have eight days by reckoning the day of service as one of the eight, and making the last of the eight days also the day for answering. That certainly would be giving *less* than eight days.—Webb v. Fairmaner, 3 M. & W. 475.

The rule nisi would be objectionable, I think, for being thus made returnable too soon.

Per Cur.—Rule discharged.

FARMERS' AND MECHANICS' BUILDING SOCIETY V. LANGSTAFF.

Debt on bond—Pleading—Demurrer—Right of Building Society to sue in its corporate name—9 Vic. ch. 90—13 & 14 Vic. ch. 29.

Debt on bond given by defendant as one of five joint and several obligors, conditioned for the proper discharge of certain duties by one A. B. T., as secretary and treasurer of a certain society.

2nd plea—"Not damnified."

3rd plea—If plaintiffs damnified, damnified by their own default.

5th plea—That the affairs of the plaintiffs were managed by certain directors: that from the making of the bond until 31st January, 1850, A. B. T. did fulfil all things by him to be done pursuant to the condition: that from that time till A. B. T. ceased to be secretary and treasurer, plaintiffs managed the affairs of said society, contrary to its rules, &c., whereby defendant's liability was greatly increased, by reason whereof, &c., defendant became discharged.

7th plea—The affairs were managed, &c.: that said directors did, without consent of defendant, order that one of the obligors should be released, which order became binding on said society, whereby such obligor was discharged.

8th plea, same in substance as last.

Special demurrers to each plea.

Held, 2nd and 3rd clearly bad : 5th plea bad, because it was not shewn that the observance of the condition was qualified or affected by some matter existing and in the knowledge of both parties, when bond given : 7th and 8th pleas bad, as shewing no release in law.

Held. also, that the plaintiffs might sue in their corporate name.

Debt on bond given by defendant as one of five joint and several obligors, conditioned for the proper discharge, by A. B. Townley, of the duties of the office of secretary and treasurer to the Farmers' and Mechanics' Building Society, and for his rendering just accounts.

2nd plea, after oyer—That plaintiffs were not damnified.

3rd—That if plaintiffs were damnified, they were damnified by their own default, &c.

5th plea was in substance, that according to the act 9 Vic. ch. 90, certain rules and regulations were made for the government of the said F. & M. Building Society, and were entered in a book kept for that purpose, and thereby under the act became binding according to said act (sec. 1 & 3): that the F. & M. B. S. appointed directors, and delegated to them the control and management of the said society, to be executed according to the said rules: that from a day named, and after the making of the writing obligatory, and from thence to a day before commencement of the suit—to wit, 31st January, 1850—when A. B. Townley submitted a full statement of the affairs of the society, and when said accounts were audited, and were allowed and approved of, said A. B. Townley did faithfully and truly, &c., according to the rules aforesaid, perform the duties of the said office according to the condition: that after said accounts and the allowance thereof, up to the time A. B. T. ceased to be secretary and treasurer—to wit, from 31st January, 1850, to 27th February, 1851—said directors did not manage the affairs of said society according to the rules thereof, but wilfully neglected the same; by reason whereof, and inasmuch as defendant had no notice of the premises, defendant became discharged; averment, that always from the making of the said writing obligatory until the neglect aforesaid of the directors, A. B. T. did faithfully and truly, &c., according to the condition

The 7th plea was that certain rules were made for the government of the F. & M. B. S., and entered in a book, and thereby became binding : that by virtue of the statute plaintiff's had appointed a board of directors, to whom was delegated the management according to said rules : that there were several obligors besides the defendant : that before the commencement of this suit the said directors, at a meeting lawfully convened under said rules, did, by virtue of the powers delegated to them, without consent of the defendant, order and direct that one of the obligors should be wholly released, which order and direction was duly entered in a book kept for that purpose ; and thereby the same became binding on the society, whereby such obligor was wholly discharged.

Demurrer to 2nd and 3rd pleas, assigning for causes—that the said pleas neither denied the right of action nor admitted it : that if they were intended to shew a performance of the condition by A. B. T., or any matter of justification, excuse, or discharge, they should have especially pleaded the same ; and for uncertainty.

Demurrer to 5th plea, assigning for causes—that no rule of the F. & M. B. S. was set out to justify the defence alleged in the said 5th plea, nor any rule whatsoever set out, and that the said plea, was no answer, and effects no matter of denial or confession and avoidance to the action.

Demurrer to the 7th plea, because it did not appear that the said rules were adopted by the society, nor was their tenor and effect shewn, nor that they gave the directors power to make the release and discharge pleaded ; nor was the resolution communicated to the obligor discharged thereby, nor acted on by him or by the society ; nor did it appear that there was a release under the seal of the society, or under the seal of the president and treasurer : that no consideration was shewn for such release, nor any agreement for it : that such release was not effectual in law : that no power was shewn in the directors to give such a release by resolution.

Demurrer to 8th plea, because no special or general authority was shewn in the directors to release the obligors :

no consideration is shewn for the release : it was not shewn that the resolution was acted upon or communicated to the obligor or defendant, or that either of them agreed thereto: that no release effectual in law was shewn in the said 8th plea, because it was not shewn that the resolution was allowed, or was not disallowed by the society.

Joinder in demurrer.

Dalton for demurrer.—The 2nd and 3rd pleas are clearly bad.—*Arbouin v. Anderson* (a).

As to the 5th plea—the action is on a bond ; to discharge the obligors, there must be something under seal, or the fact pleaded must be a fraud in plaintiffs on the obligor.—*Trent Navigation Company v. Harley* (b) ; *Peel v. Tatlock* (c) ; *Shepherd v. Beecher* (d) ; *Pitman*, 187 ; *Lord Arlington v. Merrick* (e).

They should have set out the rule delegating their authority.

As to the 7th plea—there are no rules set out, nor does it appear that these rules enabled the directors to release or discharge the sureties in bonds by a resolution.

The 8th plea sets out rule, but the other objection applies to this plea as well as to the 7th. The defendants object to the declaration, contending that the company cannot sue in their corporate name. The objection arises under the statute of 1846, sec. 12. There are no negative words in that section depriving the corporation of the right to sue, which they have at common law as incidental to their existence. He referred to 13 & 14 Vic. ch. 79, sec. 2, and to *Bac. Abr. "Corporations."*

John Duggan, contra, insisted that the 12th sec. of 9 Vic. ch. 90, prevented their suing in their corporate name. The succession of right of action from one president and treasurer to their successors is expressly provided for. The 3rd sec. enables the directors to make such a by-law. The 13 & 14 Vic. ch. 79 is confined to the particular cases referred to in the preamble. The 2nd and 3rd pleas are good.—*White v. Ausdell* (f).

(a) 1 Q. B. 498.

(b) 10 East 34.

(c) 1 B. & P. 419.

(d) 2 P. Wm. 288.

(e) 3 W. Saund. 407, 408, 409.

(f) 1 M. & W. 348.

Crooks on the same side.—The act gives no corporate seal: it indemnifies the president and treasurer from individual liability for acts done on behalf of the corporation. The stat. 7 Will. IV. ch. 14, sec 14, does not apply.

The 5th plea is good.—Trent Navigation Company v. Harley; *Whitcher v. Hall* (a); *Bamford et al. v. Iles et al.* (b); *Warre et al. v. Calvert et al.* (c); *Anderson v. Thornton* (d). As to 7th and 8th pleas, no other mode of release but by a resolution of the board of directors was open to the plaintiff's. It is in force unless disallowed by the act. The disallowance is new matter, and should be replied.

Cameron, Q. C., in reply.—The 5th plea is bad. The words are "after making of the said writing obligatory, he performed his duty." It is not said that from *the time* of making it he performed his duty. The plea should also say what rule or order the directors disobeyed; in what there was that neglect which would discharge the defendant. As to the 7th and 8th pleas, an order to release, is no release in law. The act of 1837 confers a corporate seal. 12 Vic. ch. 10, sec. 24 is still stronger.

The bond was taken by the plaintiffs, as a corporation, and could not have been taken otherwise. A bond from the treasurer to the treasurer would be an absurdity, as on such a bond the treasurer would be plaintiff against himself.

DRAPER, J., delivered the judgment of the court.

The 2nd and 3rd pleas are clearly bad, and call for no observation. In *White v. Ausdell*, the plea that if the plaintiff was damnified he was damnified of his own wrong, was denied by the replication; but that does not shew that the plea would have been held good on demurrer.

Looking at the plain meaning of the condition, the fifth plea can be no answer, unless it be clearly shewn that the observance of the condition was qualified or affected by some matter, existing and in the knowledge of both parties when the bond was given. Now the court can neither assume nor infer this, and unless there were a rule the observance or non-observance of which would directly

(a) 5 B. & C. 269.

(b) 18 L. J. N. S., Magisterial cases 49.

(c) Ad. & E. 143.

(d) 13 Q. B. 271.

qualify or effect the observance of the condition, the plea is no answer ; but no such rule is shewn. Besides, the condition is for the honesty and faithfulness of the secretary and treasurer, *per se* ; and on the face of it is an unqualified undertaking. It seems a strange kind of logic to reply, he was not honest and faithful, it is true, but then you did not keep so close a watch on him as was necessary, and therefore because you were not sufficiently on the alert to prevent his being dishonest and unfaithful, our undertaking to indemnify you against his misconduct is discharged.

The case of the Trent Navigation Co. v. Harley (a) was cited for the defendant, but it appears to me rather to be an authority for the plaintiffs ; and I think plaintiffs are entitled to judgment on this plea.—Vide *Peele v. Tatlock* (b).

The 1st clause of the statute enacts, that when twenty persons or more have agreed to constitute themselves a building society, and have signed and sealed a declaration of such wish, and deposited it with the clerk of the peace, they shall be a corporation by such name and style as a building society, as is set out in the declaration *for the purpose* of raising by monthly or other periodical subscriptions a stock ; and that it shall be lawful for the several members of the society from time to time, to assemble to make rules for the government of such society—to impose fines and forfeitures on the members—to amend rules, report, and make new rules. The 3rd section authorizes every such society to appoint any number of its members as a board of directors ; *the powers* of such directors *being first declared in* and by said rules, The directors shall in all things delegated to them act for and *in the name of the society*. All acts and orders of the directors *under the powers delegated* shall have the like power as the acts and orders of the society would have had, provided that the acts of directors shall be entered in a book, and be subject to review, allowance and disallowance of the society, in such manner as the society by its general rules shall direct.

It is upon this latter clause that the 7th & 8th pleas are founded : I do not think either plea good. The 7th is bad,

(a) 10 East. 34.

(b) 1 B. & P. 419.

because it only states that the directors did order that the obligor W. should be released, but does not aver that any release was made in pursuance of such order; and, admitting that the order would be binding on the society—as to which the proviso subjecting the orders of the directors to review, allowance or disallowance, would have to be considered—yet, as the plea only professes that there was an order and direction to release, that is but a step towards, but is not in law, a release and discharge. And I am equally of opinion that the 8th plea is bad; for, though it asserts that the directors did by a resolution relieve and discharge a co-obligor, yet the resolution should have been set out, that the court might judge of it, and see whether it imported or amounted in terms to a present release, and could be treated as an act and order of the directors, under the powers delegated to them, and entitled to have the like force and effect as the act and orders of the society at any general meeting thereof would have had. If this plea were not bad for that reason, it would be further necessary to inquire whether an act or order of the society at a general meeting, unless under seal, or carried out by some instrument under the seal of the president and treasurer, would discharge any obligor from his bond to the society, which at present I think it would not—See *Taylor v. Dulwich Hospital* (a).

Bain v. Cooper (b), was cited in support of 7th plea. It only shews that a surety may plead the release of his principal, without making profert of his indenture of release which he pleads.

Wane et al. v. Calvert et al. Administrator of Laycock (c), was also cited. I do not see its bearing. In that case, only *non est factum* was pleaded; and the question was how certain facts, which could not be pleaded as a defence, could be given in evidence to answer the plaintiff's claim for damages. *Anderson v. Thornton* (d), involves also a different question from this case, the plea was that the party for whom as clerk defendant was surety was appointed from clerk to be a manager, and thereby the responsibility

(a) 1 P. Wms. 6, 55. (b) 3 M. & W. 751. (c) 7 Aa. & El. 143. (d) 3 Q. B. 271.

was increased. Yet the plea was held bad for not averring that he ceased to be clerk when he became manager.

But it is said the plaintiffs cannot sue in their corporate name, nor have a common seal, as the statute does not provide for either.

The 10th sec. of 9 Vic. ch. 90 provides, that the society may take and hold any real estate, or securities thereon, *bona fide* mortgaged or assigned to the society, to secure payment of shares, or of loans made by, or by debt due to the society; and may proceed on such mortgages, &c., for the recovery, &c., at law or in equity.

The 12th section directs that all real estate, moneys, goods, chattels, property, and effects whatever, and all titles, securities for money, and other obligatory instruments and evidences or memorials, and all other effects whatever, and all rights and claims belonging to or had by such society, shall be vested in the president and treasurer for the time being, for the use and benefit of the society and its members; and after the death or removal of any president or treasurer shall vest in their respective successors for the same estate and interest as the former president or treasurer had therein, and subject to the same trusts, without any assignment or conveyance; and, shall for all purposes of action or suit, criminal or civil, in anywise touching or concerning the same, be deemed and taken to be, and shall in every such proceeding (when necessary) be stated to be the property of the persons appointed president and treasurer for the time being, in the proper names of such president and treasurer, without further description; and such persons shall, and they are hereby authorized to bring or defend, or cause to be brought or defended any action, &c., civil or criminal, in law or equity, in all cases touching the property right or claim of the society; and in all such cases may sue and be sued, plead and be impleaded in their proper names, as president and treasurer of such society, without further description.

The clause closely resembles the 8th of the imperial statute 3 & 4 Vic. ch. 110, sec. 8. But then these societies are not corporations; and, instead of all these powers being

conferred on the president and treasurer, most of them are conferred on trustees for the society. These societies commenced by 5 & 6 Wm. IV. ch. 23.

Our statute contains a provision for the appointment of directors. The English act recognizes trustees, who for some purposes supply the place of the directors. The treasurer's securities are taken to the trustees, and they are to publish the statement of the accounts, funds, &c.

That our legislature intended some difference by making each of these societies a corporation, must be assumed. Can it be properly said that all they meant is expressed in the first clause, which says they "shall be a corporation, body, corporate and politic, by such name and style as a building society, as by such declaration so deposited as aforesaid shall have been declared to be the name by which the persons so executing the same desire such society to be known, *for the purpose* of raising by monthly or other periodical subscriptions of the several members of the said society, and in shares not exceeding the value of 100*l.* for each share (each subscription not to exceed 20*s.* per month for each share), stock or fund, for the purpose of enabling each member thereof to receive out of the funds of the society the amount or value of his share or shares therein, to erect or purchase, &c., to be secured by way of mortgage or otherwise, to the said society until the amount or value of his share or shares shall have been fully paid to the said society, with the interest thereon, and with all fines or liabilities incurred in respect thereof;" with power (sec. 3) to appoint directors, who (sec. 9) are to appoint officers, pay salaries and expenses, which officers having to deal with money are to become bound in a bond *in such form* and amount as the directors, may determine with *two* sufficient sureties; and also with the power conferred by the 10th sec.

If this be so, then as a corporation, if they can *take and hold* real estate, it would seem they would require a seal to testify the corporate acts in taking and holding, as well as leasing or disposing of such real estate, at least, independently of the power given to proceed at law

or in equity on such mortgage, &c., which seems at variance with the 12th sec.

It was urged in support of the plaintiffs' right to sue in their own names, and also as to the necessity of the release pleaded being by a corporate act under seal, that it is an incident tacitly annexed to the creation of every corporation, and that it may sue and be sued; and that it shall have a common seal. And so in the case of Sutton Hospital (*a*), *Norris v. Staps* (*b*), Com. Dig. "Franchise." Ft. 20. And by 12 Vic. ch 10, sec. 5, sub-section 24, it is enacted that words making any association or number persons a corporation or body politic and corporate, shall be construed to vest in such corporation power to sue and be sued, contract and be contracted with, by their corporate names; to have a common seal, to alter and change the same at their pleasure, &c. But sec. 5 begins by enacting that in every act of the parliament of the province passed or to be passed in the present or any future session, so it would not apply to the act of 9 Vic. ch. 90. A provision for a similar purpose was contained in the statute of Upper Canada 7 Wm. IV. ch. 14. sec. 14, but that statute does not necessarily govern the construction of the statute passed since the union. The stat. 13 & 14 Vic. ch. 79, was also referred to, the first section of which enables actions in certain cases to be brought in the name of the president and treasurer of such society; or in the corporate names of the society; and the 2nd sec. enacts that any such society "may pursue the same course, exercise the same powers, and take and use the same remedies to enforce the payment of any debt or demand due to such society, as any person or persons, body corporate or politic, may now by the law take or use for such purpose." And whatever doubts might otherwise have existed, this last act effectually takes these away for it first recognizes suits in the names of the president and treasurer, or in the corporate name of the society, and it, secondly, gives the society the same remedies to recover any debt or demand as any person or body corporate have, which includes a power of suing in their own names.

We think there should be judgment for the plaintiff.

(*a*) 5 Co. Tart. 10, 30. b.

(*b*) Hob. 211.

DAVIS ET AL. V. BROWNE.

Trover—Estoppel—Sale of goods—29 Car. 11., ch. 3.

A. by artifice obtained an order from B., directed to his agent to deliver a certain amount of wheat to A., which order A. presented, not to the agent but to the defendant, a wharfinger, in whose warehouse, there was wheat belonging to B. The defendant thereupon gave him his certificate or *bon* for the wheat deliverable on demand. The defendant shortly after learned how the order had been obtained, and B. being dissatisfied with him for having given such a certificate, the defendant notified A. that he would not deliver the wheat to him; whereupon A., it was alleged, transferred his right to the wheat to the plaintiffs though there was no indorsement or transfer of defendant's certificate to plaintiffs. The wheat was subsequently demanded of the defendant, who refused to deliver it; but it did not appear that the person who demanded it shewed any authority from the plaintiffs to do so, or that defendant ever knew of the alleged transfer to plaintiffs, or of their having any interest whatever in the wheat. Plaintiffs brought trover: and it was *Held* that the alleged sale to plaintiffs was void under the Statute of Frauds; that defendant was not estopped by his certificate from denying plaintiffs' title.

Semble: That A. had no power to sell the wheat to plaintiffs, he not having an undisputed control over it himself.

The plaintiffs, Jason Davis and Bradley Dickenson Davis, sued the defendant Browne in trover for a quantity of wheat.

Defendant pleaded—first, not guilty; secondly, plaintiffs not possessed.

On 7th May, 1850, Morse contracted to sell wheat to Nelson R. Davis & Co. (not these plaintiffs) and gave them a writing as follows:

N. R. Davis & Co.,

Bought of C. A. Morse,

Ten thousand bushels Canadian Wheat being now in James Browne's warehouse at Toronto, and William Adamson's warehouse at Port Credit, C. W., at 95 cents—9,500 dollars.

Received payment by Drafts on Howard & Sons of Boston.

(Signed) CHAS. A. MORSE.

Lockport, May 7, 1850.—The above deliverable to N. R. D. & Co. free on board.

One Borst, as agent for Morse, who resided in Lockport, had been purchasing wheat for him in Canada, and at the time of Morse signing this writing there were about 10,000 bushels of Morse's wheat in Adamson's warehouse at Port Credit, and upward of 5,000 at Toronto. It was contemplated by the parties that Davis and Company would get half of the 10,000 bushels at the one place, and half at the other. They were to send for it and take it when they pleased. On 20th May, Morse, who lives at Lockport, in the State of New York, wrote to N. R. Davis offering to

transport the wheat for him to any port on the lake, and inquiring when he intended to take it. It did not appear that Nelson R. Davis & Co. took any advantage of this offer.

On 15th June, Morse gave an order to the defendant Browne, at Toronto, to deliver to N. R. Davis & Co. 4877 bushels of wheat, he paying three cents per bushel for storage. It seems to have been part of the agreement that the winter storage should be paid by N. R. Davis & Co.; and it appeared that the above quantity of wheat, being all the defendant then had in store for Morse, it was agreed that the difference between that and the 5000 bushels to be delivered at Toronto should be obtained by N. R. Davis & Co., at Port Credit.

About that time N. R. Davis & Co. sent a vessel to Port Credit, and received about 3000 bushels; but when they went again they found that Adamson, who kept the warehouse at Port Credit in which Morse's wheat had been deposited by his agent, had failed; and that there was a deficiency in his accounts for wheat stored with him. Morse had sold part of the 10,000 bushels which he had there in store on 7th May 1850, when he sold 10,000 bushels to N. R. Davis & Co., but he had left 5,000 bushels to answer his contract with them.

N. R. Davis then came to Toronto, and Borst, the agent of Morse, gave him an order on the defendant for 338 bushels which was all that Morse then had in the defendant's warehouse disposable on account of this contract—there being still in the defendant's warehouse in Toronto about 740 bushels besides, which Borst had purchased for Morse with moneys which had been placed with him by Morse for the purchase of wool; but for this wheat Borst declined giving an order to Davis.

The failure of Adamson, who kept the warehouse at the Credit, gave rise at once to the question between Borst and N. R. Davis, as to which party should bear the loss of any deficiency in the 5000 bushels which had been left in the warehouse there for N. R. Davis & Co.; and on the same day (28th June, 1850), that Borst gave an order on this defendant to deliver to N. R. Davis & Co. the 338 bushels, he went over to Lockport, where Morse lived, to confer with

him on the subject. Nelson R. Davis went over in the same boat. It was proposed by Borst, on the way, that they should go to Lockport together from Lewiston; but, on a plea of being indisposed, Davis said he would remain at Lewiston, and allowed Borst to go without him, but afterwards passed him on the road without being observed; and getting first to Morse, he made a statement to him that he had a schooner laying at Toronto to take in wheat, but that his agent, Borst, had refused to deliver it, insisting on an additional charge per bushel for storage, on account of the wheat having remained so long in store, he said nothing of Borst having come over with him, nor of Adamson's failure. Morse, not willing that there should be any difficulty about the mere charge for extra storage, gave him, upon this representation, an order on Borst, as follows:

Lockport, June 28, 1850.

DEAR SIR,—You may deliver Messrs. N. R. Davis & Co. the whole amount of wheat sold him, say 10,000 bushels, he having arranged with us for all storage over three cents per bushel: give him what we have in store at Port Credit, and the balance at Toronto.

Yours &c.,

(Signed) C. A. MORSE.

Immediately after Davis had obtained the order, Borst came in and informed Morse of the true state of the case. Morse had, in the meantime, suspected there was something wrong, from the hurried manner of Davis, and immediately went in pursuit of him, and requested him to give him back the order, but he refused; and, as it was addressed not to Browne, the defendant, but to Borst, Morse thought no advantage could be taken of it.

On the next day, Davis presented the order to the defendant at Toronto, and obtained from him, in consequence, the following acknowledgment or *bon*, for all the wheat which he then held in store for Morse:

Toronto, 29th June, 1850.

1065 $\frac{1}{2}$ $\frac{2}{3}$ bushels of Wheat.

Good to Messrs. N. R. Davis & Co. for one thousand and sixty-five bushels twelve pounds of winter wheat, on demand, purchased from C. A. Morse, Esq., Lockport, being now in my store, being on an order for balance of ten thousand bushels wheat 1829 $\frac{2}{3}$ $\frac{7}{8}$ deliverable at Toronto.

(Signed) JAMES BROWNE.

Browne, afterwards learning the facts of the case, refused to give anything more than the 338 bushels, for which Morse had before given him an order ; finding that his conduct was complained of by Morse, in giving the accountable receipt of 29th of June, upon an order directed to Morse's own agent, and not to him.

On the 11th of July, 1850, Nelson R. Davis & Co. wrote to the defendant respecting the balance of wheat yet undelivered, claiming it as due to them, offering to indemnify the defendant if he would ship it for them, and giving no intimation whatever that they had parted with their interest in it to these plaintiffs, Jason and Bradley Davis, who are merchants living at Yonge Town, not engaged in the wheat trade, one of them being the father, and the other a brother, of Nelson R. Davis. This action was brought by them, claiming under an alleged sale made to them of this undelivered parcel of wheat. Nelson R. Davis was called as a witness, on the trial, to support plaintiffs' case ; and he swore that, three or four days after the defendant gave him the receipt of 29th June, he and his partner sold the wheat to the plaintiffs, shewing them the defendant's receipt : he admitted that the plaintiffs are not dealers in wheat ; that he was indebted to them, and turned out this wheat and got credit for it, knowing at the time that this defendant, Browne, had been forbidden by Morse to deliver the wheat to him.

In September, 1850, an attorney called on this defendant and demanded the balance of the 10,000 bushels of wheat ; but it was not proved, on the trial, in whose behalf the demand was made. The answer was, that the 300 and odd bushels could be had at any time, but not more.

The learned judge (McLean) ruled, that the plaintiffs must shew either a note in writing of the bargain with them, or part delivery, or part payment ; that no note in writing had been shewn ; that there was clearly no delivery of any part of the wheat by Nelson R. Davis & Co. to them, for they had it not under their control, and could not get it to deliver, and no payment on account shewn ; that Nelson R. Davis, according to his own account, knew that he was undertaking to assign what he could not deliver, because the property was held adversely to him, and he knew his

interest to be repudiated : and further, that the order to Borst, on the faith of which the defendant gave his receipt, having been obtained by fraud, Nelson R. Davis could claim no benefit under it, and could make no valid assignment of any interest so acquired. Leave was reserved to the defendant to move for a non suit on the objections taken.

The jury gave their verdict for the plaintiff for 181*l.* 15*s.*

Hagarty, Q. C., moved for a nonsuit on leave reserved, or for a new trial on the law and evidence, and for misdirection.

Vankoughnet, Q. C., shewed cause.—There was no such specific appropriation of any particular wheat in warehouse as would have made N. R. Davis & Co. liable to the risk of its destruction. Adamson, who made away with it, was Morse's agent, not the plaintiff's or N. R. Davis & Co.'s. The assignment by parol to plaintiffs is not void under the Statute of Frauds, for it was the payment of a debt—Walker v. Hussey (*a*); and the defendant cannot set up this defence. Then handing the receipt to plaintiffs would be sufficient to give plaintiffs a right as a symbolical delivery of the wheat. Defendant is estopped by his receipt from referring to any dispute between N. R. D. & Co. and Morse—Hawes v. Watson (*b*), Lucas v. Dorrien (*c*), Swamvich v. Southern (*d*). The fact of Browne's notice of refusal to deliver to N. R. Davis & Co., being prior to the assignment to plaintiff makes no difference, for it could not prevent N. R. Davis & Co. from selling to plaintiffs, and it does not appear plaintiffs had notice of this difficulty.

Hagarty, contra.—Browne's receipt to N. R. D. & Co. does not affect to be more than that he would give him the balance of the original purchase by Davis from Morse—but it effected no transfer of property in any specific wheat ; and though it might prove a contract on the part of Browne to deliver it, it could not transfer Morse's property. The wheat Morse sold to Davis was 10,000 bushels he then had at Port Credit and Toronto, not 700 bushels purchased subsequently by Borst, without Morse's knowledge even. The 700 bushels never became N. R. D. & Co.'s property, and therefore trover will not lie.

(a) 16 M. and W. 202. (b) 2 B. & C. 540. (c) 7 Taunt. 278. (d) 9 Ad & E. 895.

ROBINSON, C. J., delivered the judgment of the court.

The failure of Adamson the warehouseman, was an occurrence, as we may suppose, which neither Morse nor his vendee, Nelson R. Davis, could have prevented; and yet one or the other of them must have borne the loss. Suppose for the present that Nelson Davis had never parted, or pretended or attempted to part, with his interest, each would be justified in endeavouring to throw it on to the other by insisting on whatever legal principle would hold himself to be exempt.

For all that appears if Nelson Davis had applied within a reasonable time—that is, within three or four weeks after the sale made to him on the 7th May, 1850—he would have found 5000 bushels at the Credit and 5000 bushels at Toronto, as seems to have been intended and understood when they made the bargain; there was that quantity at each place, according to the evidence, and Nelson Davis therefore had a right to go and take it away. If he did not call in a reasonable time for it, and the 5000 bushels at Port Credit was in the meantime destroyed by fire, or if the warehouseman wrongfully converted it, whose should the loss be? Unless it be clear that Morse must bear it, then he would not be liable in any form or action; but that is not necessary to be determined now. If the present action by Nelson Davis's alleged vendees against this defendant, Browne, be held by us to have failed at the trial on any ground, and if we should think that they could not recover on another trial, then it will be for Nelson Davis to consider whether he has a good ground of action for not delivering the wheat. If he is advised that he has, he can bring it; but such an action upon the contract would lie against Morse only.

The action against this defendant Browne is not for failing to deliver wheat upon any contract made by him, but for wrongfully converting certain wheat, the property of the two plaintiffs, Jason and Bradley Davis. Detaining any wheat which really was the property of the plaintiffs, would be evidence of such conversion if the detention were wrongful.

But it is objected that the verdict given in their favor was clearly wrong ; first, because they gave no legal evidence of the title as vendees, the goods sold being much above 10*l*. in value, nothing being given in payment to bind the bargain, and no part of the wheat having been delivered.

2ndly, Because Nelson Davis had not a legal power of disposition of any wheat in Browne's hands at the time he alleges himself to have sold the wheat to the plaintiffs, for he knew that Browne before that time had positively refused to let him have the wheat, being advised by Morse that Nelson Davis had practised a fraud upon him, and that it must not be delivered to him ; so that in selling, as he says he did to these plaintiffs, he sold what he knew he actually could not transfer, and was in fact disposing of nothing more than a right of action for non-delivered wheat, or for wrongfully detaining it.

3rdly. That even if these plaintiffs had become the purchasers legally and without fraud, yet that before the defendant can be made liable in trover for not delivering the wheat to them, as there was no evidence of any actual conversion, it was necessary to shew that the defendant was informed of the plaintiff's right, and was requested to give the wheat to them or to their agent, and that the evidence failed on that point, as I think it did.

Any of these objections, if sustained, would be grounds of nonsuit. Independently of them, it is urged that at any rate the verdict should not stand ; because, without regarding any objection to the alleged sale to plaintiffs as not being proved sufficiently according to the Statute of Frauds, and admitting that although Nelson Davis knew his title, to be disputed and denied, and that the wheat was intended to be withheld from him, he could still make a good sale of it to another, yet that the evidence was such as could leave no reasonable doubt in the mind of the jury that the alleged sale to these plaintiffs was all a pretence, fraudulently set up in order to let in a recovery in his own favor, upon his own evidence, either by collusion with them, or

without their knowledge ; and that in fact no such sale was ever made.

I think the evidence on the trial was such as ought to have satisfied any jury of that fact, and that the alleged sale was a mere contrivance to impose upon them, and to pervert justice ; that, however, would be ground, not of nonsuit, but for relieving against the verdict by granting a new trial.

So also I think the evidence of Nelson Davis's imposition upon Morse, in obtaining the order which Morse gave on Borst, and on his faith, in which this defendant took upon himself to give his *bon* or certificate of the 29th June, 1850, was so clear that the jury should have treated the case as if no such order had been given, and no such *bon* obtained by Nelson Davis from the defendant. But that again would only be a ground for a new trial, because the jury must pronounce upon the alleged fraud : it cannot be assumed by the court.

If any of those grounds on which the nonsuit has been moved ought to be decided in the defendant's favor, he would be entitled to our judgment in that shape ; and then the last two points I have adverted to as grounds for a new trial, will become immaterial to be further discussed.

The defendant is entitled, in my opinion, to have his rule made absolute for a nonsuit.

I see nothing that can warrant us in holding that there was legal evidence, such as the Statute of Frauds requires, of a sale by Nelson Davis to these plaintiffs. This case bears no resemblance to *Lucas v. Dorrien* (a), cited by the plaintiffs. There was no order on Browne, the defendant, to hold the goods for the plaintiffs, as vendees, nor any assent by him, verbal or otherwise, that he would do so. There is no estoppel upon him from denying the plaintiff's title, for there is no evidence that before this action was brought he was ever made acquainted with it, if indeed (which I much question) there had been any pretence or thought of such a sale before the action was commenced, or at least before the wheat was demanded.

(a) 7 Taunton, 278.

There was no indorsement or transfer by the delivery of Browne's *bon*, or certificate, admitting that on such indorsement or transfer the property would pass. It was not given to these plaintiffs. The case of Walker v. Nussey, 16 M. & W. 302, decides that if it had been clearly proved that the plaintiffs did agree verbally to take the wheat, and give Nelson Davis credit for it, yet that would not answer the requisition of the Statute of Frauds, as being proof of payment; and as to there being any part delivery of the wheat, there was nothing of the kind.

I think also that when Nelson Davis found that Browne, being informed that an imposition had been practised in obtaining the order on Borst, to which he had given credit, and on which he inadvertently, and rather thoughtlessly acted, as if it had been addressed to himself, refused to let him have the wheat that was in the store for Morse, he was not in a condition to sell to another what he had no actual undisputed control over himself. He was, in truth, only transferring a chose in action. Browne gave no certificate afterwards to the plaintiffs which binds him to acknowledge their right as vendees.

And I am also of opinion that if the sale to the plaintiffs had been legal in all respects, yet there was no evidence to make the defendant liable as for a wrongful detention of the wheat from the plaintiff's because there was no evidence that the defendant was ever told by the person who went to demand the goods from him that the plaintiffs had, or pretended to have, any interest in them, or that they were demanded on their behalf, nor indeed was it shewn that the gentleman who made the demand had in fact any authority from the plaintiffs to do so, or was aware that they had anything to do with the matter.

It was necessary that the defendant should know to whom he was required to deliver the wheat before anything can be assumed against him by construction as a refusal—because the defendant might in any case of the kind feel that he was safe in refusing to give way to the claim of the person who had fraudulently obtained a certificate from him, though he might not choose to take on himself the

risk of refusing to deliver the wheat when demanded by a *bona fide* purchaser for value ignorant of any fraud. He should be told who it is that demands the goods, in order that he may know what course to take.

On these grounds, any one of which would be decisive, I think the rule for nonsuit should be made absolute.

DRAPER, C. J., concurred.

BURNS, J.—I think the rule for entering a nonsuit should be made absolute; and I arrive at that conclusion for two reasons: First—Supposing the defendant not to be in a position to dispute, after giving the *bon*, or *good*, for the 1065 bushels of wheat, on the 29th June, 1850, that he had that wheat belonging to N. R. Davis & Co. in store or on hand; yet the plaintiffs have shewn no title to it. It does not appear that anything more was done in the transfer by N. R. Davis & Co. to the plaintiffs than merely the delivery of the paper acknowledging the wheat to be deliverable on demand. The instrument in this case is not even an acknowledgment that the defendant would deliver to order as we frequently see done where the intention is that it may pass from hand to hand; not that the introduction or non-introduction of words evincing such intention, in my opinion, would have any effect upon the construction in the present case. The claim is founded upon the right to consider that the delivery from one to another of the paper acknowledging of having the property in possession is such a constructive transfer of the possession of the goods themselves that the holder can, without anything done by or on the part of the *custodier*, maintain an action for the property in his own name against the *custodier*. The effect of holding such a position to be law, would be to give the same effect to warehouse receipts as to bills of lading. I take the two cases of *Farina v. Horne* (a) and *McEwan v. Smith* (b) to be completely decisive on this point against the plaintiffs. When the defendant gave the delivery receipt on the 29th June, 1850, he became the agent of N. R. Davis & Co. for the delivery to them of the wheat he

(a) 16 M. & W. 119.

(b) 13 Jur. 265.

acknowledged he had of theirs on hand ; he did not become the agent of any person to whom they might give an authority to receive the wheat. Some act on his part was necessary to constitute him the agent of the plaintiffs as respected the wheat. Some act was required to shew that he treated the possession of the property changed from N. R. Davis & Co. to that of the plaintiffs before his position to the plaintiffs can be held to be such that they, in their own names, can call upon him. No agreement can be based upon the position that it might be convenient for trade in cases of this description, that the delivery of the *indicia* of property carries with it the possession, as in the case of floating property ; for, as Lord Cottenham has said, "*The nature of a delivery note is well known in the trade ; it is perfectly well known that a title to goods does not pass by a delivery note ; and it is perfectly well known that it does pass by a bill of lading.*" We had occasion to consider this doctrine a good deal in the case of Proudfoot v. Anderson (*a*) ; and whatever one portion of the mercantile community may think as to the convenience of trade, in holding that the property itself should pass by the delivery of the order or receipt, yet, when we find that another portion act upon the law being otherwise, we cannot but give effect to the latter, as it certainly is the law.

Secondly—Besides this question, I am of opinion the defendant was not, by the giving of the receipt of the 29th of June, 1850, estopped from shewing that the wheat mentioned in that receipt was not the property of N. R. Davis & Co. The facts, I think, shew clearly that if the defendant had been acquainted with all the circumstances, he never would have given the receipt. The wheat was the property of Morse, and what has Morse done to change it, and make it the property of N. R. Davis & Co. ? He agreed on the 7th of May, 1840, to sell N. R. Davis & Co. 10,000 bushels of wheat which he then had in part at defendant's warehouse, and in part at a warehouse at Port Credit. He transacted his business by an agent, as appears by the

(a) 7 U. C. R. 573.

evidence, which agent gave orders for the delivery of the wheat to N. R. Davis & Co. On the 28th of June, 1850, the agent in Toronto gave an order to N. R. Davis & Co. for the remainder of the wheat, to complete the contract, as he says, there being a misunderstanding between him and N. R. Davis & Co. respecting the quantity which should have been received at Port Credit. On the same day (28th of June) N. R. Davis went to Lockport to Morse, and obtained from him an order on his (Morse's) agent for the delivery of the remainder of the wheat, to complete the tract of 10,000 bushels, Morse at the time not being himself aware there was any misunderstanding about the wheat at Port Credit. This order N. R. Davis brought to the defendant, without shewing it to Morse's agent, or obtaining any authority from him to the defendant; and the defendant, thinking it all right and that there was no room to doubt its being sanctioned, received the order, and thereon gave his own receipt to Davis & Co., acknowledging the wheat to be theirs. Did this act of the defendant's convert that which had been Morse's property into property of N. R. Davis & Co.? I do not think it did. The defendant did not act by the orders or directions of Morse, though he acted upon Morse's order to his agent. The order is, that the agent should give what wheat was in store at Port Credit and the remainder, to fulfil the order, at Toronto; and yet the defendant gave his receipt for the whole amount to make up the contract deliverable at Toronto. If the defendant could not convert Morse's wheat—and I think he could not under the circumstances—into property as belonging to N. R. Davis & Co., then it is not pretended they had any wheat of their own which would fulfil the exigencies of the receipt; and if the defendant is estopped from shewing the circumstances, it follows as a consequence that he is liable to both parties for the same wheat—a position rather unreasonable.

If we were compelled to hold the first position in favour of the plaintiff, it might be that the defendant could not avail himself of the second, unless the transfer were fraudulent and without consideration; and upon that, if this case

turned on it, I should not be satisfied upon the evidence in this case that the plaintiffs had established themselves to be *bond fide* holders of the property in question.

Per Cur.—Rule absolute for nonsuit.

LAWLER V. SUTHERLAND.

Debt for rent—*Under-lessee of part, sued as assignee of the whole, of the term*—*Nonsuit.*

In debt for rent on a lease, the declaration stated “that the right and interest of the lessee in the demised premises came by assignment to, and was vested in, the defendant.” It was in evidence that defendant was at most only under-lessee for a part of the term.

Held per Cur.—That a non suit was rightly directed.

Debt for rent.—The plaintiff, Mary Lawler, declared in debt, setting forth that Lawrence Lawler, being seized in fee of certain premises, on the 27th June, 1838, demised them by indenture to Willian Ware, for seventeen years from the above date, at a yearly rent of 25*l.* to be paid on 1st October, 1st January, 1st April, and 1st July, in each year; covenanting to pay the said rent: that Ware entered and was possessed of the term; that Lawler, on 16th March, 1847, made his will, and appointed the plaintiff his executrix, and devised the rents and profits of his real estate to the plaintiff until his son Michael Lawler should attain the age of twenty-one years; that he died on the 20th September, 1847, seized of the reversion of these premises, whereby the plaintiff became entitled to the said rent until Michael Lawler became of age: that on 1st January, 1849, *the right and interest of William Ware in the demised premises came by assignment to, and was vested in, the defendant Sutherland*, who entered and became possessed; and that Michael Lawler is still an infant; that after such assignment, and before the commencement of this suit—to wit, on 2nd October, 1850,—25*l.* became due from the defendant to the plaintiff for four quarters’ rent due 1st October, 1850, and is still in arrear, yet that the defendant hath not paid, &c.

The lease was set out on oyer. It contained a covenant by Ware, for himself, his executors, administrators, and

assigns, with the lessor, to pay the rent to him, his executors, administrators, or assigns.

The plaintiff pleaded—1st. Denying that all the estate, right and title, interest, and term of years then to come, &c., of the said W. Ware, vested by assignment in the defendant, in manner and form, &c.

2ndly. That Lawrence Lawler was not at the said time in the declaration mentioned seized in fee, &c., of and in the premises therein stated have been demised in manner and form, &c.

At the trial before McLean, J., the plaintiff was nonsuited; and she has obtained a rule to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff for 25*l.* on leave reserved at the trial.

It was proved that Ware had assigned the term to one McKenzie, who upon an agreement in writing not produced, gave possession to a partner of the defendant Sutherland, in the spring of 1845, to hold for three years; and the defendant has ever since been in possession.

Cameron, Q. C., shewed cause against a rule nisi, to enter a verdict for plaintiff and 25*l.* damages. Defendant was only a sub-lessee and not assignee, and cannot therefore be liable.—*Holford v. Hatch* (a); *Earl of Derby v. Taylor et al.* (b); 2 Chitty on Pleading, 395, note (m),

Crooks, contra—insisted that in law the defendant must be looked upon as assignee of the whole term, for he continued in possession after the lease was ended.

ROBINSON, C. J., delivered the judgment of the court.

Without entering into the questions whether under the circumstances the plaintiff, Mary Lawler, could bring debt, in the form in which she has brought it—that is not, as executrix, but in her own right as devisee, and whether if she could sue in this form, the probate was the proper evidence of her title—we are of opinion that the nonsuit was rightly ordered; because it is shewn that the defendant, who is sued as assignee of Ware, was not his assignee of the term: and therefore not liable to be sued

(a) Dougl. 183.

(b) 1 East. 502.

as such, either in covenant, or in debt on the specialty. He is not liable through the deed, either by reason of privity of contract or privity of estate, for it is not true as averred in the declaration, that "*the right and interest of Ware* in the demised premises came by assignment to, and was vested in, the defendant," for the defendant was at most only under-lessee of Ware for three years, leaving a reversion of several years of the term still in Ware.

The plaintiff therefore could not sustain her declaration in regard to that essential averment, which the defendant by his plea had expressly put in issue.

The cases of *Holford v. Hatch*, *Lord Derby v. Taylor et al.*, *Curtis v. Spitty (a)*, *Hare v. Cator (b)*, are expressly in point. I refer also to 2 Chitty's Pleadings, 395, note (m); 2 Stark. Ev. 351.

SMITH v. INGOLDSBY.

Trespass—New assignment in—Effect of pleadings.

Plaintiff declares for breaking and entering his close, &c., and in a 2nd count for assault and battery.

Defendant pleads, to the 1st count, that there was a public highway across the said close, and that the plaintiff having wrongfully shut up the same, he removed the obstruction.

To the 2nd count, public highway across plaintiff's close—defendant passing over the same was prevented by plaintiff, and *molliter manus imposuit*.

Plaintiff replies to these pleas, traversing the highway as alleged, and then new assigns for trespasses at other times, and for unnecessary damage.

Defendant pleads not guilty to the new assignment.

Held per Cur., Defendant having established a right of way as alleged, and only one trespass being proved, which was committed in the said highway, and without excess, is entitled to a verdict.

The plaintiff, by the 1st count of his declaration, complained that the defendant on the 20th March, 1850, and on divers other days and times between that day and the commencement of this suit, at the township of Etobicoke, broke and entered the plaintiff's close, known as lot No. 24, in the 4th con. of the township of Etobicoke, and there tore up, broke down, prostrated, and destroyed ten perches of the fences of the plaintiff; and with feet in walking,

(a) 1 Bing. N. C. 756. (b) Cowper, 766.

and with cattle, horses, and oxen, tore up, subverted, and spoiled the grass and corn of the plaintiff, then being in the close, by means whereof the plaintiff was hindered and prevented from enjoying and using the said close in as full and ample a manner as he otherwise could and would have done. The 2nd count complained of an assault and battery on the plaintiff, on the 24th March, 1850, and that the defendant drove a pair of horses against the plaintiff with great force and violence, and greatly hurt and injured the plaintiff.

The defendant pleaded—1st, to the whole declaration, not guilty. 2nd, to the 1st count, justifying all the trespasses, that there was and ought to have been a certain common and public highway into, through, over, and along the said close, in which, &c., and the fences mentioned being wrongfully erected on an across the highway, and obstructing the same, the defendant removed the same. 3rd, to the 2nd count, that there was, and of right ought to be, a common highway into, through, on, and along the close in the first count mentioned, and the defendant having occasion to use the same with his cattle, horses, and carriages, the plaintiff with force and arms made an assault on the defendant, and seized and laid hold of defendant's horses, then about to pass along the highway, and prevented the defendant from passing, and the defendant defended himself, and in order that he might release his horses and pass along the highway, the defendant gently laid his hands on the plaintiff, and removed him from the horses; *quæ sunt eadem*, &c.

The plaintiff replied to the pleas—1st, similiter to the general issue; and 2nd, to the 2nd and 3rd pleas, that there was not, of a right ought not to have been, the certain common and public highway in the pleas mentioned through, over, and along the said close, as in the pleas alleged; and then the replication went on to state that the plaintiff issued his writ, and declared thereupon, not only for the trespasses in the introductory part of the pleas mentioned and attempted to be justified, but also for that the defendant on the several days and times in the declaration

mentioned, and on other and different occasions than those mentioned in the pleas, and in a greater degree, and to a greater extent, and with more force and violence than was necessary for abating, removing, and resisting the alleged obstructions in the pleas mentioned, and for passing along the ways; and also for that the defendant, on the several days and times in the declaration mentioned, with force, &c., broke and entered the said close of the plaintiff, and there tore up, broke down, prostrated, and destroyed the plaintiff's fences, &c., reiterating the declaration.

To the new assignment the defendant pleaded not guilty.

At the trial before Burns, J., at the last assizes held in the County of York, the facts of the case appeared to be these:—The *locus in quo* is situated between the township of Etobicoke and the Gore of Toronto, and the dispute between the parties was, whether the public allowance for road should be taken off the township of Etobicoke, or off the Gore of Toronto, and whether the place where the trespass took place had or not been granted by the government by the patent under which the plaintiff claimed. When the government purchased the lands which now form the townships of Etobicoke and Vaughan, a line had been run from Lake Ontario to the north, called the thirty-six mile line, or the Indian line; to the eastward of that line the government purchased, and to the westward the lands still belonged to the Indians. The township of Etobicoke was surveyed in 1798, by Mr. Hambly, the surveyor, and the plan returned by him to the surveyor general's office, shewed on the west side of the township only a single line which would seem to indicate that no road existed between the lands surveyed and the Indian line. About the year 1816 or 1817 the government purchased from the Indians the lands lying west of the line known as the Indian line, and, in 1819, Mr. Sherwood, the surveyor, was instructed to lay out the Gore of Toronto. The plan of the township made by him shews a double line on the east side. The senior surveyor in the crown lands department stated that the plans in the office could not be taken as conclusive evidence of where the road was laid out; that

there were mistakes in that respect in the plan of the township of Etobicoke, and that he should consider the evidence afforded by an examination of the ground, and the *indicia* there found, with other evidences as better than the plans. The lots lying upon the Indian line in the township of Etobicoke are from lot No. 12 to 40 inclusive, the last being the corner of the township adjoining the township of Vaughan. The order in which these lots were described from the office is as follows :—In 1799, lot No. 20 was described, and described as going to the westernmost boundary line of township; that may or may not be up to the Indian line according to whether a road was left or not. In 1800, No. 21 was described; and it is described as going to the easternmost boundary of the Mississagua lands, and this would seem to indicate no road on the east of that line. In the year 1810, lots 12, 17, 18, 27, 29, 30, 32, 33, 36, and 39, were described, and were all described as bounded by the allowance for road in the rear of the said fourth concession, which would indicate an allowance left for road on the east of the Indian line. In 1815, lots Nos. 25 and 40 were described the same as the last. Lot No. 24, the land in question was described in 1816, and described in this way—Commencing in front of the said concession, at the south-east angle of the said lot, then south 74 degrees west 27 chains more or less to the western extremity of the township, then north, &c. This, like the description of No. 29, in 1799, may or may not exclude a road, as it may be considered that the Indian line was or was not the western boundary of the township. These were all the lots described before the survey of the Gore took place. In 1819, lot No. 38 was described, and that was described as bounded by the allowance for road in the rear of the fourth concession. Lot No. 37 was described in 1830, and was described as bounded by the allowance for road on the western boundary of the township. This may or may not include the road within the township of Etobicoke, as it might be determined upon the ground. In 1831 lot No. 19 was described and that is described as bounded by the allowance for road between the two townships. Lot No.

13 was described in 1832, and in the same terms as lot No. 19. In the year 1834, lot 31 was described as being bounded by the allowance for road in the rear of the fourth concession, and in the year 1839, lot 22 was described as being bounded by the eastern limit of the allowance for road on the western boundary of the township.

The plaintiff became the owner of lot No. 24 by purchase, in March, 1843, and since that time, about two or three years since, he has closed up the road, contending that the road should come off the west side of the Indian line. The trespass was committed on the ground lying east of the line, and in that part which had formerly been travelled and used as the road. The road has always been fenced on the east side of the Indian line wherever a road can be made. In some places, in consequence of the river Humber interfering with the line, a road cannot be made, but in other places, where a road can be made, the statute labour has been expended upon the east side of the line. In the rear of the lot in question public money was expended in building bridges on the east side of the line, and the road had been used for many years until the plaintiff shut it up. Evidence was adduced to attempt impugning the defendant's evidence with respect to the road being on the east side of the line: the witnesses said that for many years past it was always considered that the road was on the west side of the line and off the Gore, but the witnesses admitted that wherever the road had been opened, it had so been opened on the east side of the line.

The road between the 7th and 8th concessions of the Gore of Toronto strikes the Indian line opposite lot No. 25, and the sideline road between lots Nos. 5 and 6 in the 7th con. of the Gore strikes the Indian line opposite lot 24, but there is no road through from the 4th to the 3rd con. of the township of Etobicoke, until coming down to the allowance between lots Nos. 21 and 22. In the year 1843, a number of freeholders required a road to be established through lot No. 24, and procured a survey of it, and got the district council to establish it, and this circumstance seemed to have annoyed the plaintiff, and caused him to take the steps he subsequently did,

At the trial it was contended on the part of the defendant that, under the replication, the right of way was in fact not in dispute, but that the proper construction of the replication was that it tendered issue upon excess, and no excess being proved the plaintiff must fail. This point on the pleadings was reserved.

On the part of the plaintiff it was contended that the defence failed under sec. 15. ch. 20, of the statute of 1845, and that the defendant could not open the road himself, but should take steps under the statute. This was overruled.

The learned judge, upon his view of the evidence, directed the jury to find a verdict for the defendant, and with the consent of the parties, submitted the following questions to the jury, with permission to the plaintiff to move to enter a verdict for him on the finding.

1. Whether there was a road in the rear of lot No. 24, in the township of Etobicoke, or not, or whether the road, if any, in the rear of that lot was in the Gore of Toronto—that is, on the west side of the Indian line.

2. Whether the road spoken of by the witnesses as opened in the rear of the lot was or had been a travelled road or not, and whether the plaintiff took possession of it because it was not required as mentioned in the act.

3. To say what sum the jury would assess as damages, if the plaintiff was entitled to a verdict.

Upon this direction the jury found for the defendant, and answered the questions as follows :—

1. That a road was laid out in rear of lot No. 24, in the survey of the township of Etobicoke.

2. That the plaintiff shut up the road, intending to take possession of it, not because it was not required by the public.

3. The jury assessed the damages of the plaintiff at one shilling.

Bell obtained a rule nisi on the leave reserved, to enter a verdict for the plaintiff on the finding of the jury; the question was whether the plaintiff was entitled to recover.

Gamble shewed cause.

Bell, contra, cited *Ellison v. Iles*, 11 Ad. & Ell. 665; *Webber v. Sparkes et al.*, 10 M. & W. 485.

ROBINSON, C, J., delivered the judgment of the court.

There certainly never was a case more clearly with the defendant upon the merits than the present. It was clearly proved that the plaintiff bought and paid for his land at the rate of so much an acre : that his vendor had a particular survey made in order to ascertain the quantity to be paid for ; that in that survey it was assumed that half at least of the public allowance for road was to come off the township of Etobicoke : that the quantity was computed on that understanding, and stakes set to mark the western limit, to which limit the plaintiff confined himself for many years without question or complaint, having a copy of the surveyor's report put into his hands when he took his deed. When it is added to this, that the plaintiff afterwards, on an occasion when it suited his purpose, and he wished to obstruct a proceeding that was taken for opening a proposed new road, actually maintained that there was a public road already in the very place where he now denies there ever was one, his conduct certainly has the appearance of being exceedingly unreasonable and vexatious.

Still that could not affect the strict legal question whether there is, or is not, an allowance for a road within the township of Etobicoke at the western end. We think the evidence made it very clear that the jury on that point did right in finding, as they did, that there was and is such an allowance.

But the plaintiff contends, as it seems he did on the trial, that he was at all events entitled to a verdict on the pleadings, (though on that point there is perhaps some doubt, for by the notes it seems that it was the defendant who relied on the pleadings for shewing that he was inevitably entitled to a verdict, if no excess was proved.)

But we see no ground for allowing a verdict to be entered for the plaintiff on the finding of the jury on the several points submitted to them. The opinion of the jury was wholly against the plaintiff on the point of the allowance formed being in Toronto, and they found that the road, which the plaintiff took upon him to shut up, is a public road that had been opened and travelled for years, and that

was necessary to be continued, in which case it could not be competent to the plaintiff to inclose it under the provision contained in 8 Vic. ch. 20, sec. 15.

The pleadings are, first, a complaint of an alleged trespass by the defendant on the plaintiff's close, being lot 24 in Etobicoke; and in a second count, a complaint for assaulting the plaintiff. The defendant pleads to the first count, that there was a public highway there, which the plaintiff stopped up, and that having occasion to pass, he entered and removed the obstruction; and to the second count he pleads that he no otherwise assaulted the plaintiff than by compelling him to let go his horses, which the plaintiff had taken hold of in order to prevent the defendant from passing along this highway.

The plaintiff replies, denying the existence of such a road; and also new assigns for trespass at other times and to a greater extent than was necessary for using the alleged road; to which new assignment the defendant pleads not guilty.

I see nothing in the case cited of *Ellison v. Iles*, 11 Ad. & Ell. 665, to establish that when the defendant proves there was a right of way in the very spot in which the alleged trespass was committed, and when no trespass was proved but on the one occasion, and in that very highway, and no excess in that alleged trespass, the plaintiff is nevertheless entitled to a verdict.

The question in *Ellison v. Iles* was raised by the special answer which the defendant gave to the plaintiff's new assignment, by which he admitted that he went *extra viam*, and justified himself in doing so. Here the defendant has simply denied the trespass newly assigned, the plaintiff not having newly assigned a trespass *extra viam*; and as soon as the defendant established a right of way across the plaintiff's close, which moreover was in the very place where the trespass was committed, he was clearly entitled to succeed on this issue as to the right of way; and the plaintiff neither shewed that the defendant was there for any other purpose than to use the road, nor that he used any illegal force on the occasion.

Per Cur.—Rule discharged.

MCCARTHY V. PERRY ET AL.

Trespass for false imprisonment—Ca. sa. set aside for irregularity.

Trespass for false imprisonment.

Plea of justification under a writ of *ca. sa.*

Replication—That the said writ was after the issuing thereof, and before the commencement of this suit, ordered to be set aside by order of the judge of the county court : 1st. Because it did not issue within a year and a day after judgment ; and 2ndly, because the *fi. fa.* was not returned within a year and a day from its issuing

Held, on special demurrer, that though these were good grounds to set aside the writ, yet they did not leave the defendants liable.

Trespass for false imprisonment against three defendants.

The first two justified as plaintiffs in a suit in the county court in Peterboro', in which they, on the 6th July, 1847, recovered in *assumpsit*, 19*l.* 0*s.* 6½*d.*, and thereupon 6th July, 1847, issued a *fi. fa.*, returnable on the 1st of October term next, returned *nulla bona* ; and thereupon on the 19th December, 1848, issued an *al. fi. fa.*, returnable on the 1st March term next, returned *nulla bona* ; and thereupon 27th March 1850, issued a *plur. fi. fa.* returnable on the 1st June term, returned *nulla bona* ; whereupon on the 18th September, 1850, defendants issued a *ca. sa.*, by virtue whereof the sheriff of Peterboro' arrested plaintiff ; *quæ sunt eadem, &c.* The third defendant, Denistown, pleads a similar justification, as attorney for the other two defendants in issuing a writ of *fi. fa.*, and *ca. sa.*

Replication to each plea.—That after the arrest of the plaintiff on the *ca. sa.* the judge of the county court made an order in writing that the said *ca. sa.* should be set aside and the plaintiff discharged from custody ; and the 3rd writ of *ca. sa.* was and is set aside. Averment—That the *ca. sa.* was set aside for irregularity, because it did not issue within a year and a day after the judgment in the plea mentioned was entered, and further, because a writ of *fi. fa.* was issued, and was not returned until after the lapse of a year and a day from the time of its issuing ; and that the execution of the judgment was not hindered by writ of error or otherwise, so that a *sci. fa.* should have been taken out to revive the judgment before the *ca. sa.* was issued.

Demurrer.—That the replication did not shew any sufficient grounds for setting aside the *ca. sa.*, or that defendants

proceedings in issuing the *ca. sa.* were irregular : that the replication did not state that the judgment was not revised by *sci. fa.* : that the replication admitted the plaintiff was arrested on the *ca. sa.* before it was set aside, and did not aver it was *void* at or before the time when defendant justifies under it ; and that it was not shewn the judge's order had been made a rule of court.

Leith, for the demurrer.—There is no averment that there was not a *sci. fa.* There was no necessity for returning and filing the *fi. fa.* within the year.—*Simpson v. Heath* (*a*) ; *Greenshields v. Harris* (*b*).

Admitting that the writ was irregular, it would afford a justification in this case.—*Prentice v. Harrison* (*c*). The distinction, where the objection to the writ is a ground of error only or a matter of irregularity, is recognised in *Phillips v. Biron* (*d*) ; *Brown v. Jones* (*e*). *Dennistown* is the attorney, and *Perry* and others, defendants, who issued the *ca. sa.*—*King v. Harrison* (*f*) ; *Belk v. Broadbent* (*g*).

The *al.* and *plur. fi. fa.* are not set aside, which are the grounds of the irregularity.—*Brooks v. Roberts* (*h*.)

Crooks, contra, contended that the order setting aside the *ca. sa.* should have been applied against in the court below. He referred also to *Codington v. Lloyd* (*i*) ; *Blackman v. Burt et al.* (*k*) ; *Montforton v. Montforton et al.* (*l*).

Leith, in reply, cited *Lander v. Gordon* (*m*).

DRAPER. J., delivered the judgment of the court.

Simpson v. Heath decides that to avoid the necessity of a *sci. fa.*, a writ of execution must be sued out within the year : and, in order to connect the writ on which the arrest takes place with that first sued out, proper continuances must be entered, for which entry the first writ must be returned and filed. But it need not be returned and filed within the year. The issuing a writ within the year if the same writ acted upon, or if a different writ, then

(*a*) 5 M. & W. 631.

(*d*) 1 Str. 509.

(*g*) 3 T R. 182.

(*k*) 4 Q. B. 707.

(*b*) 9 M. & W. 774.

(*e*) 15 M. & W. 191.

(*h*) 3 Dow. & L. 13.

(*l*) 4 U. C. R. 338.

(*n*) 5 M. & W. 631.

(*c*) 4 Q. B. 852.

(*f*) 15 Ea. 612.

(*i*) 8 Ad. & E. 449.

(*m*) 7 M. & W. 218.

the issuing of a writ in time properly connected with that acted upon, is enough.

Here the plea discloses a *fi. fa.*, issued and returnable within a year after the judgment and other writs of *fi. fa.* founded on it; and the *ca. sa.* appears issued in the same year as the *plur. fi. fa.* We cannot presume the writs not continued; and the replication discloses that the judge's order setting it aside was made, 1st, because it did not issue within a year and a day after judgment: and 2ndly, because the *fi. fa.* was not returned within a year and a day from its issuing. Now though these are good grounds to set it aside, or to avoid it by a writ of error, they seem according to cases decided, not to deprive the party of the protection of the suit.—*Prentice v. Harrison (a)*; *Brown v. Jones (b)*; and *Rankin v. DeMedina (c)*, taken together, appear to establish this view; and though here the replication states the *ca. sa.* was set aside for irregularities, it goes on explaining the grounds, which according to *Prentice v. Harrison*, especially as reported in 1 Dav. & Mer. 50, seem to be such as make the writ erroneous, but do not leave the defendants liable.

ALLEN V. SKEAD.

Promissory Note—Pleading.

Assumpsit, by the indorsee of the payee of a note against the maker.

Plea, that the defendant made it for the accommodation of the payee, and without consideration, and that plaintiff holds it without consideration.

Replication, that there was a good consideration for the making of the note—to wit, the amount of the note, and for the indorsing the note to the plaintiffs—to wit, the amount of the note.

Held, on special demurrer, replication bad.

Assumpsit by the indorsee of the payee of a promissory note against the maker.

Plea,—That the said promissory note was made for the accommodation of the payee, and that there never was any consideration for the making of the said note, and that there never was any value or consideration for the said indorsement of the said note by the said payee to the plaintiff; and that the plaintiff always held and now holds the said note without any value or consideration: verification.

(a) 4 Q. B. 852.

(b) 15 M. & W. 191.

(c) 1 C. B. 183.

Replication.—That the said defendant made and delivered the said note to the said payee for a good and sufficient consideration—to wit, the amount of the said promissory note; and further, that the said payee then indorsed and delivered the said promissory note to the plaintiff for a good and sufficient consideration—to wit, the amount of the said note; and the plaintiff bought and received the same from the said payee, and that the plaintiff has held, and still holds the same for such consideration: conclusion to the country.

Demurrer to the replication, assigning for causes that the replication, professes to answer the allegation in the said plea “that the defendant made the said promissory note for the accommodation, &c., and that there never was any value, &c., and neither confesses and avoids nor traverses the principal allegation contained in that part of the said plea—viz., that the defendant made the said note for the accommodation, &c. And also, for that the replication is an argumentative denial of the allegation in the plea that the defendant made the note for the accommodation, &c.

Joinder in demurrer.

Richards, for the demurrer.—The replication does not traverse that the note was for the accommodation of payee as pleaded.—*Gilmore v. Edmunds* (*a*); *Brown et al. v. Wheeler* (*b*).

Crooks, contra, referred to *Pearce v. Champneys* (*c*).

ROBINSON, C. J., delivered the judgment of the court.

This case seems undistinguishable from the two cases in this court, of *Gilmore v. Edmunds*, and *Brown et al. v. Wheeler*; and, as is noticed in the latter case, the case of *King v. Phillips* (*d*), supports those decisions when the objection to this form of pleading is taken by special demurrer.

The action here is not brought by the payee, as it was in those cases, but by an indorsee of the payee it being averred that the note was made for the accommodation of the payee, and is held by the indorsee without considera-

(*a*) 2 U. C. R. 419

(*b*) 6 U. C. R. 393

(*c*) 3 Dow. P. C. 276.

(*d*) 12 M. & W. 705.

tion ; but that can make no difference as to the necessity in point of form of traversing the fact pleaded, that the note in its inception was an accommodation note, which is the foundation of the defence, and which this replication does not traverse, though the defendant's plea expressly averred it.

If the replication had denied that in proper form, it would have been unnecessary to have noticed the further fact stated in the plea that the plaintiff holds the note without having given any consideration for it, since he would have a right to sue in that case, notwithstanding he had given nothing for the note, unless under some special circumstances, as where the note had been lost or stolen.

Per Cur.—Judgment for defendant.

GEROW V. CLARK.

Statute of Frauds.

A., deceased, was indebted to B, who had taken certain securities for the debt : C. on receiving these securities, gave B. the following agreement :

“ This is to certify that I., C., do agree to settle all debts against the estate of A., deceased, hereinafter mentioned ; that is, an unsettled account between B. and A., and one note of hand held by D. against the said A ; and one note held by E. against B.”

Held per Cur., not a case within the Statute of Frauds ; therefore an action will lie, though no consideration is mentioned for the promise.

The declaration stated that whereas one Tyler, now deceased, was indebted to the plaintiff in 100*l.*, and the plaintiff had also become surety for Tyler to one Lyons for 12*l.* 15*s.*, and that Tyler in consideration thereof had then given in security to the plaintiff on these accounts a promissory note against one Fenton for 15*l.*, ten acres of wheat then in the ground, on certain lands specified, and three potash kettles of the value of 100*l.* : and that whereas, at the time of the promises now declared upon, the time for payment of the debt due to the plaintiff, and of the note held by Lyons had elapsed ; and thereupon afterwards, to wit, on the 2nd March, 1846, in consideration that the plaintiff, at the defendant's request, would deliver to him the said note against Fenton, the wheat then growing, and the potash kettles, the defendant by a certain memorandum in writing promised the plaintiff to pay the following debts

which then were owing by Tyler—viz., the debt then due from Tyler to the plaintiff, being 100*l.*; a note payable to one John L. Gerow, or bearer, made by Tyler, amounting to 5*l.*, and another note made by the plaintiff payable to Lyons or bearer, for 12*l.* 15*s.*, and that he would pay the said debts within a reasonable time. The plaintiff then avers that at the time defendant made his promise Tyler was indebted to him in 100*l.* on a balance of account, of which the defendant then had notice; that he, confiding in defendant's promise, did then—to wit, on said 2nd March, 1846—deliver to defendant the note against Fenton, the wheat, and the kettles; that a reasonable time had elapsed, and yet defendant had not performed any part of his promise.

In a 2nd count plaintiff declared that on 2nd March, 1846, he was possessed, as of his own property, of ten acres of wheat, a note made by Fenton for 15*l.*, and three kettles, and that in consideration thereof, and that plaintiff would, at the request of defendant, deliver these to defendant; he, the defendant, then promised the plaintiff that he would pay the plaintiff, in a reasonable time thereafter, such amount as Tyler then owed to the plaintiff, and the amount of a note made by Tyler for payment to John L. Gerow or bearer of 5*l.*, and a note for 12*l.* 15*s.* made by plaintiff, payable to Lyons or bearer. Plaintiff averred that Tyler was then indebted to him in 100*l.* of which the defendant then had notice; that he, confiding in defendant's promise, did then deliver to defendant Fenton's note, the wheat, and the potash kettles; that a reasonable time had elapsed, yet that defendant had not performed his promise.

Common counts were added for goods sold and delivered, money had and received, and on an account stated.

Defendant pleaded—1st, “non assumpsit.”

2ndly, to 1st count, that the plaintiff did not deliver to him Fenton's note, the wheat, or the kettles.

3rdly, to 1st and 2nd counts, as to 9*l.* parcel of the moneys therein mentioned as payable to Lyons, that after the accruing of that cause of action, and before the commencement of this suit—to wit, on 2nd May, 1846—he paid to the plaintiff the said 9*l.* in satisfaction thereof.

4th, to 2nd count, that plaintiff was not possessed as of his own property of Fenton's note, the wheat, or the kettles.

5th, to 2nd count, that plaintiff did not deliver these to the defendant, as alleged.

The plaintiff traversed the payment of the 9*l*. mentioned in the 3rd plea, and joined issue on the other pleas.

The writing given by defendant on the 2nd of March, 1846, was as follows :

"This is to certify that I, Reuben Clark, do agree to settle all
"debts against the estate of Emery O. Tyler, deceased, hereinafter
"mentioned—that is, an unsettled account between Benjamin
"Gerow, (the plaintiff) and E. O. Tyler ; and one note of hand
"held by John L. Gerow against the said E. O. Tyler ; and one
"note held by J. Lyons against Benjamin Gerow."

(Signed) R. P. CLARK.

(Witness) WILMOT GEROW.

There was indorsed on this a receipt from the defendant for Lyons of 9*l*., as being paid on the 2nd of May, 1846.

It will be observed that no consideration whatever was expressed or could be collected, from the face of this instrument.

It was proved at the trial that, at the time of its being signed, the plaintiff gave to defendant Fenton's note, the wheat on the ground, and the potash kettles, as the consideration for this undertaking.

E. O. Tyler was then dead, and his widow was administratrix of his estate. The defendant had sued out an execution against her for a debt due to him by the estate ; and in order to relieve the property of the estate from the plaintiff's claim, he agreed on receiving Fenton's note, the wheat, and the kettles, to pay what is mentioned in the writing, and defendant paid the 9*l*. on account of the note held by Lyons, and he himself received the payment of Fenton's note.

The defendant having made this arrangement enforced his execution against Tyler's estate, and the property delivered over by the plaintiff to the defendant, was sold by the bailiff upon it.

The administratrix seemed to have been concerned in bringing about this arrangement, but the plaintiff also acted in the matter, and when the paper was signed it was handed to him.

It was very clearly proved that the defendant had deliberately entered into the agreement, and had received the benefit of it on his part ; that is, that he had received the consideration for which he gave it.

The defendant's counsel moved for a nonsuit at the trial on the grounds—

1st, That the agreement was not, as stated, between the plaintiff and the defendant, but between the defendant and Mrs. Tyler.

2ndly, That it was void under the Statute of Frauds, being for the debt of a third party, and no consideration being stated in it.

3rdly, That the delivery of property to the defendant as a consideration was not proved.

The learned judge overruled these objections, reserving leave to the defendant to move for a nonsuit.

The jury found a verdict for the plaintiff, and 35*l.* 1*s.* 1*d.* damages. *Paterson*, in this term, obtained a rule nisi for a nonsuit on leave reserved, or for a new trial without costs on the law and evidence, and for misdirection; against which *Wallbridge* shewed cause.

The Statute of Frauds is not applicable to this case. It is a new contract, with which the administratrix had nothing to do. The delivery to the defendant of securities, with which the plaintiff might have paid himself, formed a new consideration between the parties.—*Castling v. Aubert*, 2 East, 325; *Walker v. Taylor*, 6 C. & P. 752. There may be a binding promise to pay the debt of a third party exempt from the statute.—*Edwards v. Kelly et al.*, 6 M. & S. 204. The whole transaction might have been proved by parol.

Patterson, contra.—This agreement comes within the statute, as being “a promise to pay the debt of another;” and in *Wain et al. v. Warlters*, 5 East. 10, it was held that the consideration, as well as the promise, must be expressed in writing.

The evidence shewed a promise to the administratrix, and not to the plaintiff; this was a variance for which a nonsuit should have been directed.

ROBINSON, C. J., delivered the judgment of the court.

If the case be one within the statute, then there is no room for doubt that the plaintiff should not recover because the writing does not contain the slightest mention of a consideration for the promise, nor any reference to any other writing which would shew a consideration; and the decision in *Wain et al. v. Warlters*, 5 East, 10, though often questioned, and its soundness doubted, is upheld, as a binding authority in *Saunders v. Wakefield*, 4 B. & Al. 595, and in many recent cases, to which we must conform; though I confess I think an unfortunate liberty was taken in that case with the Statute of Frauds, when the word "agreement," as used in the sentence at the end of the fourth section, was held to mean anything more than the promise mentioned in the preceding part of the clause: that is, the promise to pay the debt of another.

By holding it to mean also the consideration for the promise, which was rather the agreement on the other side, and requiring in consequence that the consideration for the promise must appear on the face of the writing, or in some writing to which it expressly refers, the courts have (and I venture to think unnecessarily) increased the number of cases in which this act, which was intended to prevent frauds, has been made the instrument of fraud; and parties sheltering themselves under its provisions have refused to comply with engagements into which they have entered, though they have on their part received the full advantage of them, and have even left no doubt of their reality by carrying them partly into effect.

It was a very wise and just provision of the statute, that when a man is charged upon an alleged promise to pay debt of another, it must be shewn that he has made the promise in writing under his hand. It was reasonable to require this, for there might be too many creditors who, when they find the circumstances of their debtors have become desperate, may be tempted to endeavour to save themselves by unfairly pretending that the relatives or friends of their debtor had promised to pay the debt. Casual conversations, which were never intended to amount to

an assumption of a debt, might be frequently misrepresented; and it was better to guard against such frauds by requiring evidence of the undertaking in writing. It would soon come to be understood that this had been made indispensable. But that the words "agreement or promise to pay the debt of another," included also the consideration upon which the party charged had so agreed or promised, would not be so readily apprehended; and I am persuaded that many persons not lawyers, in carrying such arrangements into effect, have failed to make the writing binding, either from omitting altogether to state the consideration, or from stating it in such a way as to give occasion for embarrassing questions on the ground of variance. I do not believe that the framer of the Statute of Frauds ever meant to exact more than written evidence of the promise to pay; for when it could be shewn that a man had deliberately in writing, under his hand, engaged to pay a certain debt due by another, and could not shew that he had been deceived when he entered into the contract, I think all that was intended in the way of precaution, as to the degree of proof, was obtained. There would be then no doubt that he made the promise produced in writing under his hand; and though it would be still necessary, as well after the statute as before, to shew that there was some consideration for the engagement, yet I do not believe that it was intended to make the statement of the consideration a necessary part of the writing. I do not see why that should not be left to be proved by parol evidence, as it is in almost every other instance; for example, in the case of notes and bills and considerations for the conveyance of lands.

A promise to pay the debt of another is a "special promise," which are the words used in the first part of the clause; it is also an *agreement* to pay the debt; and such a writing, as was in evidence in this case, is surely a promise and agreement "*to answer for the debt*," and so does literally furnish all that the statute calls for. If I promise under my seal to do a certain act without any consideration whatever, I am bound by it; and in declaring upon such an engagement it would be properly called an

agreement under my seal, though there would be nothing in the instrument or in the nature of the transaction to import any agreement on the other side. The word "agreement" does not therefore necessarily import an *aggregationem*, an union of minds in something to be stipulated on both sides; and to look upon the word as necessarily meaning that, from a respect to its etymology, though we hear it every day used in a less ample sense, seems to me to savour more of subtlety than good sense.

It was difficult, no doubt to preserve consistency in the efforts to prevent the requisitions of this statute from producing great hardship; but I must say that I think in *Wain et al. v. Wartlers* the courts have increased the difficulty by exacting more than the statute requires, while in some cases they seem to have been content with less.

But, though I venture to say this, I have no hesitation in saying also that the law is at present so settled, that if the writing in this case be within the Statute of Frauds, it must be held void, for the entire absence of any statement in it of a consideration.

But we are of opinion, that according to many adjudged cases, this is not a case within the statute, and that the whole transaction might be proved by parol, if no writing had been signed; and consequently that anything necessary to make the promise binding may be supplied by parol.

The case of *Castling v. Aubert*, 2 East, 325, which was referred to in the argument, is much in point, though there are many other cases which resemble this more in their circumstances. The language of the judges in that case leaves little room for doubt that they would have decided such a case as this in favour of the plaintiff. What Le-Blanc, J., says is especially applicable here: "This is a case," he says, "where one man, having a fund in his hands which was adequate to the discharge of certain incumbrances, another party undertook that, if the fund were delivered up to him, he would take it with the incumbrances; this therefore has no relation to the Statute of Frauds."

The cases of *Barrell v. Trussell*, 4 Taunton, 117; *Williams*
2 f—VOL. IX. Q. B.

v. Leper, 3 Burr, 1886; reported also in 2 Wills. 308; Bampton v. Paulin, 4 Bing. 264—are in point. In Houlditch et al. v. Milne, 3 Esp. 86, which was a case depending on the same principle as the present, Lord Eldon said: "The plaintiffs had, to a certain extent, a lien upon the carriages, which they parted with on the defendant's promise to pay; that," he thought, "took the case out of the statute, and made the defendant liable for the amount of the bill." Edwards v. Kelly et al., 6 M. & Sel. 204, which Mr. Wallbridge cited, supports this action. There was in that case, as in this, a written promise to pay the debt of a third party, and a total omission to mention anything that led to the promise. Walker v. Taylor, 6 C. & P. 752, is also a direct authority, and a strong one, in the plaintiff's favour. There the widow of a deceased person had employed the plaintiff to conduct the funeral of her husband, and had delivered certain documents to him as security for the payment of his bill. The defendant told him his bill should be paid if he would give up the documents, and the plaintiff placed both the bill and the documents in his hands. It was objected that this was an undertaking to pay the debt of another, and required a writing; but Tindall, C. J., said: "You mean under the Statute of Frauds; but it is a new contract under a new state of circumstances. It is not, 'I will pay if the debtor cannot,' but it is 'in consideration of that which is an advantage to me, I will pay you this money.' There is a whole class of cases in which the matter is excepted from the statute, on account of a consideration arising immediately between the parties. It is a new contract: it has nothing to do with the Statute of Frauds at all.

Mr. Patterson, for the defendant, objected in this case that the alleged promise was not to the plaintiff himself;—but it is not always necessary that it should be. A promise may accrue to the party for whose benefit it is intended, though made to his agent, or to another connected with him in the transaction; but here the privity of the plaintiff with this contract was plainly made out in the evidence; and the contract as alleged, was in our opinion proved, as well

as the performance by the plaintiff of whatever was necessary to entitle him to sustain this action.

Per Cur.—Rule discharged.

DOWLING V. MILLER.

Trover—Statute of Frauds—Necessity for special plea.

Trover for a deed.

The court held, 1st—That, the defendant having shewn himself lawfully possessed, the plaintiff was bound to prove a wrongful detention.

2ndly—An agreement that the plaintiff should deliver the deed to the defendant to be returned on certain conditions, is not affected by the Statute of Frauds ; at least when pleaded by the defendant.

3rdly—such an agreement need not be specially pleaded, but would be admissible either under “not guilty” or “license,” as it negatives the alleged wrongful conversion

Trover for a certain deed or indenture, bearing date 1st March, 1848, and purporting to be made between the plaintiff of the one part, and the defendant of the other part, and to be a conveyance from the defendant to the plaintiff of certain lands, tenements, and premises, therein mentioned.

Defendant pleaded—1st : Not guilty. 2ndly : Plaintiff not lawfully possessed, &c. 3rdly : A very special plea, setting out an agreement between the plaintiff and defendant in pursuance of which the plaintiff delivered to the defendant a certain deed, to be kept by the defendant till the plaintiff should do certain things which he had undertaken to do for the defendant, with an averment that the plaintiff had not yet done what could entitle him to reclaim his deed under the agreement ; and that this is the same deed for the conversion of which this action is brought 4thly : License.

Plaintiff replied to the third plea, that he did not give up nor return to the defendant, nor did the defendant receive from the plaintiff, the said deed in the declaration mentioned, for such purposes as are in the said plea stated. And he traversed the license pleaded in the fourth plea.

The jury found a verdict for the plaintiff, and one shilling damages. The facts as they were pleaded, were proved by witnesses, but only by oral evidence. The learned judge considered that the Statute of Frauds applied ; that oral evi-

dence of the alleged agreement was not admissible, and on that ground thought the plaintiff entitled to a verdict, but he reserved the point.

McKenzie accordingly obtained a rule nisi for a nonsuit upon a point reserved at the trial, or for a new trial on the law and evidence, and for misdirection.

Weller shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The deed, it seems, has been given up; so that the costs only are concerned. It is objected that the plaintiff should have been nonsuited.

In substance the third plea was this: that the plaintiff and defendant had exchanged lands; that the plaintiff had given the defendant a deed of one lot, for which the defendant was to convey to him two lots in the township of Haldimand—viz. lot eleven, in the eighth concession, and lot twenty in the ninth. It was found that there was some difficulty about the lot which the plaintiff gave to the defendant (lot eleven, in the fifth concession of Camden), another person being in possession, making claim to a part of it; and it was in consequence, agreed that the plaintiff should return to the defendant the deed for one of the lots in Haldimand, which deed the defendant was to keep until the plaintiff had dispossessed the person occupying the lot which he had conveyed, and had made all right as regarded that lot; and it was alleged by the defendant that, in pursuance of that agreement, the deed in question was left with him by the plaintiff, and that the difficulty about the lot in Camden had never yet been removed.

It was quite unnecessary to have stated such a defence in a special plea in trover; for if it was true there was no wrongful conversion, and the refusal to give up the deed would be justified, and so could be no evidence of a conversion, the defence would have been equally admissible under the plea of not guilty, and under the plea of license.

There was no ground in our opinion for the plaintiff's recovering in this action. He took the deed for which trover is brought by the delivery of the other party, and there was nothing complained of as a conversion but his refusal to give it up. He accounted for that refusal by

shewing that he had a right to keep it, upon the understanding on which it had been placed in his hands. The delivery of the deed into his keeping was a fact, and the purpose for which it was delivered, as declared at the time, was part of the *res gestæ* of which evidence must always be admissible.

We do not consider that the Statute of Frauds can exclude the evidence, or has any application in such a case. The provision of the 4th section is, that "no action shall be brought whereby to charge any person upon any contract or sale of lands, &c., or any interest in or concerning them, unless the agreement *upon which such action shall be brought*, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith."

This is not an action brought to charge this defendant upon a contract concerning lands: he is sued for an alleged tort, and is defending himself,—not charging the plaintiff.

The defence was admissible, we think, both under the general issue and the plea of license; and as it was clear that the defendant did no wrong in possessing himself of the deed, the plaintiff was bound to shew that he did him wrong in withholding it, which he certainly failed in proving.

Per Cur.—Rule absolute.

HAWKES V. RICHARDSON ET AL.

Costs.

In an action of trespass, where the judge does not certify under 22 Car. II. ch. 9, and where the verdict is within the jurisdiction of the county court, the plaintiff is not entitled to full costs.

Plaintiff declared in trespass. In the first count he complained that the defendants on the 1st of August, 1850, and on divers other days, &c., broke and entered his close, being, &c., and broke and spoiled divers gates, and trod down the grass then growing, and prostrated and destroyed his fences, &c., and cut down and carried away a quantity of wheat—to wit, fifty acres of wheat—of the value of 100*l.*, and converted it to their own use; by reason whereof the plaintiff's close became much impoverished and deteriorated in value, to the plaintiff's damage of 100*l.*

In the second count the plaintiff charges that the defendants, on the 1st of August, 1850, with force and arms, seized and took fifty acres of wheat, of the value of 100*l.* and carried away the same, and converted it to their own use; and other wrongs, &c., to the plaintiff's damage of 100*l.*

The defendants pleaded severally not guilty "by statute," and no other plea.

The jury upon the trial found a verdict for the plaintiff, and 1*l.* damages.

The master taxed for the plaintiff full Queen's Bench costs, the defendant's attorney being present and objecting that the plaintiff was not entitled to more costs than damages, the verdict being under forty shillings.

The defendant thereupon took out a judge's summons for revising the taxation, and Sullivan, J., ordered, on hearing the parties, that the taxation be revised, and that the plaintiff be allowed the same amount of costs as damages; or, at his election, be allowed county court costs, deducting the defendant's costs of defence in the Queen's Bench.

This order to revise was obtained upon an affidavit that at the trial, immediately after the verdict rendered, the plaintiff's counsel moved the judge "for a certificate for full costs under the statute," which was refused on the ground that title to land was not in question on the trial within the meaning of the statute. The affidavit stated further that no right or title to any estate or interest in land came in question in any stage of the cause; and that the action was founded as a distress for rent in which the defendants had acted as attorneys and agents of the landlord.

Read obtained a rule nisi to rescind the order of Mr. Justice Sullivan for revision of taxation, on the ground that upon the pleadings on record the plaintiff was entitled to full Queen's Bench costs, as taxed by the Master. He cited *Purnell v. Young*, 3 M. & W. 288; *Smith v. Edwards*, 4 Dowl. P. C. 621; *Dunnage v. Kemble et al.*, 3 Bing. N. C. 538; *Anderson v. Buckton*, 1 Str. 192; *Walker v. Rob-*

inson, 2 Str. 1232 ; Barnes v. Edgard 3 Mod. 40 ; Lake v. Briley, 5 U. C. R. 307 ; Cameron's Digest, 1841, page 7.

Hagarty, Q. C., contra, cited Wright v. Piggin, 2 Y. & J. 544.

ROBINSON, C. J., delivered the judgment of the court.

It seems singular that words so plain, and a provision so reasonable as the statute 22 & 23 Car. II., ch. 9, could have received the construction which they have by a series of decisions.

What the legislature surely must have meant was, that in all actions of trespass, assault and battery, and other personal actions, where damages less than forty shillings shall be recovered, the plaintiff shall have no more costs than damages, unless the case be such that the judge can truly certify, and will certify, that a battery was proved, or that the freehold or title to land came chiefly in question.

If therefore there be actions of trespass, or personal actions, in which it might occur that title came in question, or that a battery was proved, but yet the judge does not certify that the fact was so, the plaintiff is restrained in his costs. And if there be actions of trespass, or personal actions, in which from the nature of things title could not come in question or a battery could not have been proved, then of course we need not look for a certificate, for it is enough that those circumstances could not have existed in deference to which the legislature had shewn themselves willing to allow costs ; and one would suppose it should follow as a consequence that, having no pretence in the latter class of cases for expecting a certificate, the plaintiff must equally lose his costs. Instead of that however, the courts have determined that, whenever there could be no pretence in the nature of things for expecting or asking a certificate, then the plaintiff should have full costs, because he could obtain no certificate.

This appears to have arisen from the legislature adopting too general a form of expression, when they spoke of "*other personal actions*," meaning perhaps actions for torts to the person, or to personal property. The courts have inferred that they could not have meant the statute to apply

to all actions that are called personal actions, which would include all actions that were not real or mixed ; and therefore they have understood them to mean only actions of trespass in which title might come in question, or trespass in which a battery might be proved, and no other actions ; and, in consequence, if a plaintiff should in trespass sue for taking a tree or a dozen potatoes, according to the decisions, he must have full costs, so far as this statute is concerned, though he should recover but sixpence damages.

The case of *Dunnoge v. Kemble*, 3 Bing. N. C. 538, is an authority to shew that the plaintiff in this case would not have been entitled to costs if there had been a verdict for the defendants as to the taking the goods, or if the declaration had contained no statement of a good independent cause of action of that kind distinct from the charge of trespass to the close ; but standing as the record does, with a distinct count charging an asportavit of goods, and a general verdict and damages on both counts, the authorities are numerous that the plaintiff may tax full costs on the ground I have mentioned, because in an action for such cause the judge cannot certify that title to land came in question or that a battery was proved, and therefore full costs may be taxed without the certificate, though it does seem repugnant to reason that the absence of all pretence for a certificate should place the plaintiff on better ground than the judge declining to grant one. Considering the grounds on which the principle has been established, I think it can make no difference that the plaintiff might have sued in an inferior court for taking his goods, so far at least as concerns the opinion to be given on the effect of the statute 22 Car. II., ch. 9.

But then comes the other question, why should the plaintiff have more than District Court costs on this verdict for twenty shillings ? We do not see why. He has no certificate. The having declared for trespass to the freehold is nothing. We must look at the verdict ; and that leaves it uncertain whether it was rendered upon evidence that respected title to land, or only on evidence respecting the taking of goods ; and a certificate therefore is necessary

on the principle of *Gardner v. Stoddard* in this court (Dra. Rep. 101), which is in accordance with late English decisions.

Per Cur.—Rule discharged.

MOORE V. JARRON.

Statute labour—Requisites of conviction.

A proprietor of land cannot be compelled to do statute labour in the township in which the land lies, unless he is himself resident there.

Where a form of conviction is not sanctioned by any express statute, it must be such as would be legal according to the principles of common law; and in that case, a conviction which did not express that the party had been summoned or that he appeared, nor that the evidence was given in his presence, cannot be supported.

Declaration in trespass *quare clausum fregit*, with a count for taking a cow of the plaintiff's.

Plea, "Not guilty by statute."

The facts of the case were as follows:—On the 11th of September, 1848, the pathmaster of the township of Moulton, made oath before the defendant, who is a justice of the peace for the county of Haldimand, that the plaintiff, Moore, was entered on the road list of Moulton for four days' statute labour; that he had been duly warned, but had refused to work, and had done no portion of his statute labour.

On the trial a conviction was produced, whereby, on the 16th October, 1848, the defendant, reciting the complaint of the pathmaster, that the plaintiff had refused to perform four days' labour on the roads in Moulton, for which he stood rated on the list of the town clerk of Moulton delivered to the pathmaster, adjudged the plaintiff (Moore) for the said offence to forfeit and pay a fine of one pound, being five shillings for each day for which he was rated, and the costs of the proceeding, amounting to 11s. 9d., being in all 1*l.* 11s. 9d., and he ordered the said fine and costs to be paid to him, the said justice, in four days, or to be recovered by distress and sale of Moore's goods.

This conviction was filed by the clerk of the peace on 23rd November, 1848.

On the 16th November, 1848, this defendant the justice, made his warrant under seal to one Penny, a constable,

reciting the conviction, and that Moore had not paid the fine, and commanding him to destrain the goods of Moore, and if within six days he should not pay the 1*l.* 11*s.* 9*d.*, with the charge of distress and sale, then he should sell the goods, and pay the money to him, the justice, to be appropriated according to law, rendering the surplus to Moore, on demand.

The facts on which the conviction was founded were, that Moore lived in the township of Canboro', but owned land in Moulton. He had performed four days' statute labour in Canboro' for the year 1848, upon the call of the pathmaster for the township of Canboro'.

The jury gave a verdict for the plaintiff, and 4*l.* damages; and, by consent of parties, it was reserved for the consideration of the court whether the conviction affords a legal justification under the plea.

The case was argued in Easter term.

Eccles, for the defendant, referred to 4 Wm. IV., ch. 4, secs. 3 & 20; 1 Vic. ch. 21, sec. 7; and cited *Rogers v. Jones*, 3 B. & C. 409; *Daniel v. Philipps et al.*, 5 Tyr. 295; *Mellor v. Baddeley et al.*, 2 Cr. & M. 675, reported also in 6 C. & P. 374.

Boulton, contra.

ROBINSON, C. J., delivered the judgment of the court.

We think that the verdict, which has been given for as small damages as could be given under the circumstances, must stand. The conviction must have been intended to be made under our statute 1 Vic. ch. 21, secs. 27 & 50, which prescribes no form of conviction, nor does any other statute give a form to be used in this particular case. The justice was therefore bound to follow such a form as would be sufficient under our statute 2 W. IV. ch. 4, which supplies a form to be used in all cases of summary conviction, except where a form is specially given for the particular case. Instead of following that general form, the justice has adopted the very short and convenient form given by the Summary Punishment Act, which act has nothing to do with such cases as that he had before him. We have here therefore a conviction which is neither good on the principles of the common

law, as laid down in decisions of the courts, nor warranted by any statute; for the conviction does not shew that the evidence was given in the presence of the defendant, nor that the defendant was summoned and did not appear. Such a conviction is clearly bad on the face of it. Then the case is this: The now plaintiff (Moore) was not by law liable to be convicted of any offence; for, living in Canboro', he could not be compelled to do his statute labor in another township. On that point we have no doubt. He was nevertheless convicted by an order of the magistrate, and his property sold, when he had committed no offence. He has sued for this injury: and when he is complaining on this substantial ground, and not on account of any mere slip in the proceeding, he has a right to insist that at least a conviction legal on the face of it should be shewn, which here is not the case.

I incline also to think, though it is not necessary to determine that point, that the plaintiff shewing that he did not reside in Moulton, was entitled (even if the conviction had been regular on the face of it) to insist that he was illegally convicted. There are some modern cases which seem to me to go that length.

On the ground that the defendant did not shew upon the trial a conviction legal on the face of it, we direct the *postea* to be given to the plaintiff.

Per cur.—*Postea* to the plaintiff.

MCINTOSH V. STEPHENS.

Malicious arrest—Proof of malice.

After bailable *ca. re.* sued out and placed in the sheriff's hands, defendant settled the suit in full; he was afterwards taken on the writ, and thereupon brought an action for malicious arrest.

Held Per Cur.—Not maintainable without proof of actual malice.

The plaintiff sued in case, setting forth that Stephens, the defendant, on the 10th December, 1850, sued out a *ca. re.* against him in the Queen's Bench, which was indorsed to take bail for 25*l.*; that while the writ was in force,—viz., on 31st January, 1851—and after had been delivered to the sheriff, he (the now plaintiff), McIntosh, paid to Stephens,

the plaintiff in that suit, the 25*l.* and he costs of the writ and all fees due thereon, which the defendant accepted in full satisfaction of the suit ; yet that the defendant afterwards and while the *ca. re.* was in force—viz., on the 10th March, 1851—*wrongfully and maliciously* caused the plaintiff to be arrested there on and imprisoned.

Defendant pleaded the general issue.

It was proved by the plaintiff's attorney in the first suit, that the defendant did pay the debt and costs to the plaintiff's attorney on the 21st January, 1850 ; that the payment was arranged between the plaintiff and defendant in the witness's office, and that Stephens supposed the suit would be countermanded. He swore that he was himself under the impression that McIntosh had been arrested, and had given bail before the settlement, and therefore did not send word to the sheriff, and that six weeks afterwards he heard that McIntosh had been just then arrested.

The sheriff proved that, having the writ in his possession, and having no directions not to act upon it, he arrested McIntosh who informed him that the suit was fully settled : that he, the sheriff, offered to let him go, if he would make him secure, but that McIntosh said he was a stranger there and could not ; and so he was sent to gaol, and kept there a week, and was then discharged by order of the plaintiff's attorney in the suit.

The plaintiff's attorney swore, that when McIntosh settled the suit in his office, he told him that a writ had been issued, and he paid the costs of it ; but he was not sure that McIntosh understood it to be a writ for his arrest.

Upon the trial the letter which Stephens's attorney wrote to the sheriff on the 13th or 14th March, 1851, directing him to discharge McIntosh, was put in. The attorney says in it that he would have written to him when the debt was settled, but that it escaped his attention ; that hearing nothing of an arrest, though six weeks had elapsed before the settlement, he supposed the bailiff had not taken the trouble to inquire about him, and that after the suit was settled, he thought that McIntosh shewing that he had taken up the writ, he was sued on, would be sufficient.

A nonsuit was moved for at the trial on the ground that there was no malice shewn. The learned judge thought that he must hold there was *crassa negligentia* in not instructing the sheriff, from which malice might be implied, but he reserved leave to the defendant to move for a nonsuit in term.

The jury found a verdict for the plaintiff, and 5*l.* damages.

Hagarty, Q. C., obtained a rule nisi to enter a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection, or to arrest the judgment.

J. Wilson, Q. C., shewed cause—he cited *Tebbutt v. Holt*, 1 Car. & Kir., 280; *Gibson v. Chaters*, 2 B. & P. 129.

Hagarty, Q. C., contra, cited *Page v. Wiple*, 3 East, 314; *Crozer v. Pilling*, 6 D. & R. 129; *Scheibel v. Fairbain*, 1 B. & P. 388.

ROBINSON, C. J., delivered the judgment of the court.

If the ruling at the trial in this case cannot be reconciled with the judgment in *Page v. Wiple*, 3 East, 314, and if that case be otherwise recognized as authority, we cannot look on it as over-ruled by the single opinion of Baron Parke, sitting at Nisi Prius, in the case of *Tebbutt v. Holt*, 1 Car. & Kir., 280, assuming that his opinion is inconsistent with *Page v. Wiple*.

The decision in *Crozer v. Pilling*, 6 D. & R., 129 is not applicable here, because in that case the defendant refused to give a discharge, which, if wrong, was a wilful injury, not a mere negligent non-feasance.

The case of *Scheibel v. Fairbain*, 1 B. & P. 388, seems to be strongly against this action; for it appears by the evidence in this case that the plaintiff had nothing to rest upon but the mere omission to send notice to the sheriff; he did not attempt to prove anything of such a kind as the court in that case say might perhaps have sustained an action for non-feasance; he did not pretend that anything had taken place besides his payment of the money and his arrest afterwards upon a writ which had issued before. We think upon that evidence, if *Page v. Wiple*, and this case of *Scheibel v. Fairbain*, which was a well-

considered judgment, be still law, the jury should have been told that the mere omission to send notice to the sheriff was not the breach of a strict legal duty incumbent on the defendant, and could not therefore of itself constitute proof of malice ; and that, as they really had nothing else from which to infer malice, the defendant was entitled to a verdict. It must be borne in mind that the writ here was not sued out after the money was paid, for that it would be *crassa negligentia* affording ground for imputing malice, or rather there would be ground for contending that it was, though in the case of *Gibson v. Chaters*, 2 B. & P. 129, it was held, that even in such a case, the defendant was properly nonsuited, because no evidence of actual malice had been given.

Both these cases, of *Page v. Wiple* and *Scheibel v. Fairbain*, are cited by text writers without any intimation that their authority has been doubted. In this declaration however malice is averred. The objection is not, as in *Page v. Wiple*, that the action is rested by the pleadings merely on the neglect of a supposed duty, which duty the law does not recognize ; but that the plaintiff, undertaking to shew something more than that has charged the defendant with harrassing him vexatiously and from a malicious motive. It is granted that the case may have been such as would shew a good right of action on that ground ; but surely to support the case on that footing, something more must be given in evidence than the mere omission to do what the courts hold the defendant was not bound to do ; otherwise upon a declaration, such as that in *Page v. Wiple*, containing a count as for a malicious arrest, and another count founded merely on the negligent omission to send notice without charging malice, the jury might be told that they could not legally find a verdict against the defendant on the latter count, because there was no such duty incumbent on the party ; but that they might if they pleased, without proof of anything besides the omission, find against him on the other count which alleged malice, for that it was *per se malicious* in the defendant to omit doing what he had no business to do, or rather what it was not his duty to do. But this would be absurd.

We do not feel prepared to act against the authority of judgments apparently so deliberate as those I have referred to, and it seems to us impossible to uphold this verdict on the evidence without disregarding them. The rule therefore must, in our opinion, be made absolute for a nonsuit.

Per Cur.—Rule absolute for nonsuit.

MCDOUGALL V. RIDOUT ET AL.

Lease—Assignee of rent—Covenant to repair.

Plaintiff sued defendants, who were the assignees of the rent for the term which plaintiff was to enjoy, on a covenant by his lessor to repair, as being a covenant running with the land; but *held*, that defendants, not being assignees of the reversion for any term or time, were not liable on the covenant.

Plaintiff sued defendant, being president and treasurer of a building society in Toronto; and set forth that one Fish was seized in fee of certain lands, and being so seized on 1st of September, 1848, by indenture between him and the plaintiff, he demised to the plaintiff, his executors, administrators, and assigns, certain land, with a grist mill thereon, and the appurtenances, situate in, &c.; to hold the same to the plaintiff, his executors, administrators, and assigns, *for a term of four years* yet unexpired, rendering a certain rent; that Fish covenanted by that indenture, for himself, his heirs and assigns, that *he* would at all times during the said term, as often as it might be required repair and keep in repair the dam belonging to the said mill; that the plaintiff entered into possession of the demised premises with the appurtenances, and was possessed thereof for the term so to him granted; that afterward, and during the term—viz., on the 12th December, 1849—*“all the estate, right, title, and interest, property claim and demand whatsoever of the said Fish, in and to the said demised premises, with the appurtenances by assignment thereof then made, legally came to and vested in Ridout, one of these defendants, as president of the said building society, and in one Townley who then was treasurer thereof, and their successors and assigns, under and subject, and without prejudice to, the covenants in the said indenture contained, for the term by the said indenture granted, to*

and for the use of the said building society, accorded to the statute and rules of the society; that the defendant Crew had since succeeded Townley, as treasurer, and by reason thereof the defendants became, and were at the commencement of this suit seized of the premises, with the appurtenances in the said indenture mentioned, *for the said term*. Plaintiff then averred that after defendants became so seized of the premises with the appurtenances in the indenture mentioned, and during the term thereby granted to the plaintiff as aforesaid, the defendants did not at all times when required to keep the dam *belonging to the mill* upon the demised premises in good and sufficient repair; but, on the contrary, permitted the same to be in an insufficient condition for want of needful repair, for a long time—viz., for fifteen months. And so the said defendants did not keep the said covenant so by the said B. Fish made as aforesaid, but refused and do refuse to perform the same.

The sixth plea which was demurred to, was in effect that in the said indenture in the declaration mentioned, the plaintiff did for himself, his heirs, &c., covenant, &c., with Fish, his heirs, &c., that he would at all times repair, &c., the race belonging to the said mill, &c., and at the expiration or sooner determination of said lease would peaceably yield up to Fish the said premises, so being sufficiently repaired, &c., reasonable use and wear thereof, casualties by fire, in the mean time only excepted, &c.: that the weak state of the dam, for want of necessary repairs, of which the plaintiff complained, did not nor did any part thereof arise from, nor was occasioned by reasonable use, &c., as aforesaid; wherefore the defendants say that the plaintiff is bound to keep in repair, &c., and was and is liable to defendants for not keeping the said dam in repair at and for the period in respect of which the not keeping the same in repair is in the declaration alleged as a breach of covenant by the said defendants.—Verification.

Demurrer, assigning for causes, that the said indenture should have been set forth; and because there is no allegation that plaintiff was bound to repair except inferentially;

and because it offers to set up one cause of action against another, &c.

Joinder in demurrer.

Bell, for the demurrer, referred to *Sampson et al. v. Easterly*, 9 B. & C. 505; *Vyvyn v. Arthur*, 1 B. & C. 410; *Spencer's case*, 1 L. C. 22; 32 Hen. VIII. ch. 34.; *Plow.* 75.

Dalton, contra—The defendants are only chargeable as assignees of the reversion; but here is no assignment of the reversion; the assignment can operate only on the rent—*Gilb. Rents*, 6, 7, 112; *Allen v. Bryan*, 5 B. & C. 512; *Sal.* 118; 1 *Leo.* 22; *Cro. Eliz.* 637, 651.

ROBINSON, C. J., delivered the judgment of the court.

We think it is quite clear this declaration cannot be sustained, and it is therefore unnecessary to discuss the sufficiency of the plea; the action is one brought against the defendants upon a covenant to which they are no parties; and it is not therefore founded upon privity of contract, but on privity of estate. They are sued by the lessee as being assignees of the lessor upon a covenant to repair, as being a covenant that runs with the land—assuming the mill dam to be upon the premises demised, which I understood Mr. Dalton to admit might be fairly collected from the terms of the deed. But the declaration does not shew these defendants to be the assignees of the reversion, or of any part of the reversion—that is, not assignees of the reversion for any term or time.

It shews indeed the very contrary plainly, and that they are only assignees in effect of the rent for the term which the plaintiff is enjoying. But in *Milnes v. Branch*, 5 M. & Sel. 417, the court expresses a clear opinion that covenant cannot run with rent; and it is assumed in 1 *Smith's Leading Cases*, page 38, that the burthen of a covenant will not run with land in any case, except that of landlord and tenant, and that only by virtue of the statute 32 Hen. VIII. ch. 34.

But between the plaintiff and these defendants there is no relation of landlord and tenant—they have no interest in the land which extends beyond his, if indeed they can be said to have any interest in the land at all. All that the

declaration states is, that all the estate and interest which Fish had in the land came to be vested in these defendants for the term by the said indenture granted : in other words, they were to have the rent while the plaintiff held the estate, which is all they could have under such an assignment. It is impossible to hold that they have any estate in reversion which can make them liable, as on a covenant running with the land : for, as the court said in *Milnes v. Branch*, there is in such a case neither privity of contract nor privity of estate.

The cases cited by Mr. Dalton, shew clearly that the defendants are not in a situation to distrain for the rent, because they have no reversion in the land. In truth they take nothing by this assignment but the rent, for Fish having granted the estate for four years to the plaintiff, could not grant it for the same time to others.

Per Cur.—Judgment for the defendant.

DOE DEM. MEYERS ET AL. V. MARSH.

Construction of deed where habendum repugnant to the premises.

By deed of bargain and sale A. M. conveyed to H. M., and to *her heirs and assigns*, certain freehold premises, to hold the same unto the said H. M., her heirs and assigns, “so long as she remains the widow of M. M., but should she marry or decease, the above described land will become the property of the two sons of the said H. M., C. M. and J. M., for ever.”

Covenant, of title were added to the said H. M. her heirs and assigns.

Held, that the words in the habendum constituted a limitation and not a condition : that such a limitation was void, as being repugnant to the grant in the premises ; and that the grantee took a fee simple.

Ejectment for part of lot 5, in the first concession, and broken front of Sydney.

On the trial the defendant contended that it was shewn that these plaintiffs, and the persons under whom they claim, had been out of possession more than twenty years before the action brought ; and also, that at the time of the deed being made to the lessors of the plaintiff the defendant was in adverse possession, claiming the fee. The jury did not pronounce on either of these points, but the trial resulted in a nonsuit on the following ground :—

Matthias Marsh died, seized of the land, intestate, leaving his son, Archibald, his heir, who made a deed in 1829 to

Hannah Marsh, widow of Matthias Marsh, of 150 acres, being the easterly part of lot 5, described precisely as in the consent rule in this action.

She afterwards married, and her husband (Cobb) and she made a sale and conveyance of the same land to the lessors of the plaintiff.

The deed from Archibald Marsh to the widow, now Mrs. Cobb, was not produced at the trial, nor was any evidence given of its loss, further than by proving that it had been searched for and could not be found among the papers of A. H. Meyers or of Hannah Cobb, formerly Marsh. Its contents were proved by production of the memorial registered, and a subscribing witness to the deed proved its execution. According to the statement of this deed in the memorial, the grantor, Archibald Marsh, granted, released, transferred, and confirmed unto Hannah Marsh, *her heirs and assigns*, all that parcel or tract of land, situate, &c., &c., containing by admeasurement 150 acres, more or less, being, &c.; then followed a description of the land by metes and bounds, and then followed the habendum in these words:—"To have and to hold the said above granted premises with all the privileges and appurtenances thereunto belonging to the said Hannah Marsh, her heirs and assigns, so long as she remains the widow of Matthias Marsh, but should she marry, or decease, the above described land will become the property of the two sons of the said Hannah Marsh, Charles Marsh and James Marsh, for ever." Then followed covenants for title, "and that the said Hannah Marsh, her heirs and assigns, shall and may at all times quietly possess and enjoy the premises, and that the grantor and his heirs will warrant and defend the same to the said Hannah Marsh, her heirs and assigns, against all claims whatsoever."

The memorial being produced and read, the defendant's counsel objected, that so far as the memorial shewed the contents of the deed, it appeared that the conveyance by Archibald Marsh to Hannah Marsh was made to her, "her heirs and assigns, to hold to her, her heirs and assigns, so long as she remains the widow of Matthias Marsh, but

should she marry, or decease, the above described land will become the property of the two sons of the said Hannah Marsh, Charles Marsh and James Marsh, for ever ;" that she married afterwards to her present husband, Cobb, which defeated her estate, and so she had nothing to convey to the lessors of the plaintiff.

The plaintiffs answered, that the granting part of the deed must prevail over the habendum, where the two are inconsistent, and that the warranty and covenant for quiet enjoyment are to Hannah Marsh, "*her heirs and assigns, for ever.*"

The learned judge ruled that the widow's estate ceased on her marriage to Cobb, and on that ground directed nonsuit.

There were objections urged as to the sufficiency of proof by the memorial ; and as has been mentioned, the defendant also relied upon the evidence of adverse possession for twenty years ; but the nonsuit appears to have been ordered entirely on the ground of the widow's estate being defeated before she conveyed to the lessors of the plaintiff.

Vankoughnet, Q. C., obtained a rule nisi to set aside the nonsuit—he cited Co. Litt. 299 a ; 2 Rep. 236 ; 4 Cruise Dig. 433 ; Goodtitle dem. *Dodwell v. Gibbs*, 5 B. & C. 709.

Eccles shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We have here in the first place, the grant of an estate in fee simple by plain and express words, not only in the granting part—that is, in the premises—but also in the habendum itself, but followed by a limitation in the habendum to hold during her widowhood ; which later limitation is so utterly inconsistent with the premises, that it could not, if it stood alone in the habendum, be held otherwise than a void limitation. Then come the words, " but should she marry or decease, the above described land will become the property of the two sons of the said Hannah Marsh, Charles and James Marsh." As her death is certain to happen, this latter part of the habendum leaves no possibility of any estate devolving, under any circumstances, on her heirs : there is nothing therefore for the word " heirs"

to operate upon, and the habendum is utterly repugnant to the previous grant of a fee simple in the premises, as well as inconsistent in itself, and is on that account void. As to what is said about the grantee marrying, we cannot, I think, look upon that as anything else than a qualification, or restriction placed upon the estate for life, which is inseparable from that limitation, and must fall with it. It is as if the grant had been to Hannah Marsh and her heirs, *to hold* for her life, provided she continued unmarried ; which limitation following the grant of the fee, would be clearly repugnant and void. If the words, " but should she marry, then the above described land will become the property," &c., could be looked upon as forming a substantial independent condition, unconnected with the limitation of the estate for life, (which I do not think they can), still Charles and James Marsh would not upon, her marrying come at once into possession of the estate, as if it were a conditional limitation, but it would be left to the grantor, or his heirs to enter for the forfeiture by breach of the condition. The defendant Samuel Marsh, for all that is shewn, stands in no other situation than any stranger in possession would do. But I think we are to look at all that is said in this habendum as constituting a limitation rather than a condition, and as coming within the rule that when the habendum is repugnant and contrary to the premises it is void, and the grantee will take the estate given in the premises. This rule, it is said, is a consequence of the maxim, that deeds shall be construed most strongly against the grantor, and therefore that he shall not be allowed to contradict or retract, by any subsequent part of the deed, the gift made in the premises. And it is in many books given as the common illustration of this rule, that if lands were given in the premises of a deed to A. and his heirs, habendum to A. for life, the habendum is void, because it is utterly repugnant to and irreconcilable with the premises. The only room for doubt is, whether, although upon this principle the limitation for life in the habendum must, as a mere limitation, be looked upon as void, the words respecting her marriage might not be taken to constitute a condition which would

be equally applicable as a defeasance of the greater or less estate, and so not repugnant to what went before. I have already stated that in my opinion, we must look upon these words as a mere qualification of the void limitation for life, and if it could be construed to be an independent valid condition, the breach of it could only be taken advantage of by the grantor or his heirs. We think, therefore, that the rule should be made absolute for setting aside the nonsuit, for that was ordered upon the ruling that the marriage of Hannah Marsh, was a forfeiture of the estate, making the deed *ipso facto* void.

As to the objection that the plaintiff could not give secondary evidence of the deed to him because he had not served notice on the defendant to produce it; there was no reason for imagining that the deed could be in possession of this defendant, as it conveyed no interest to him or any one in privity with him, and there was no occasion therefore to serve him with a notice. (a)

Per Cur.—Rule absolute.

CARR V. DUNN.

An action will not lie on the covenant for title in a deed of bargain and sale, when it is shewn that the grantor had a good title at the time of conveying,, although the plaintiff experienced delay and expense in getting into possession.

The plaintiff sued on a covenant of the defendant, made on the 31st October, 1848, and contained in a deed of bargain and sale of certain land in the township of Ancaster, whereby the defendant covenanted that at the time of executing the deed he had in himself "good right, full power, and lawful and absolute authority, to grant, sell, and convey the said land to the plaintiff, his heirs and assigns." And the declaration charged that the defendant had not in himself good right, full power, and lawful and absolute authority, to grant, sell, alien, convey, and confirm the said lands, &c., in manner and form, &c.; by reason whereof the plaintiff had entirely lost and been deprived of the said lands and premises.

(a) See Cro. 476; Bac. Ab. condition. A. H.; Shep. Touch. 131; 1 Inst. 203, 234, b; 2 Bl Com. 155; Crabbe, R. P. §§ 1324. 2142, 2189; 4 A. & E. N. S. 662; Skinner, 543.

The defendant pleaded, that at the time of sealing and delivery of the said indenture *he had in himself* good right, full power, and lawful and absolute authority to grant, &c., in manner and form, &c; and on this plea issue was joined.

There was in truth no defect in defendant's title. He had succeeded to a valuable lot of land, 31 in the 2nd con. of Ancaster, as heir to his uncle, who had died many years ago, in Canada, seized of these and other lands; and this defendant, his nearest relative, living in Scotland, and being in humble station, had never heard of the estate having devolved upon him till lately. In the meantime this lot had for a series of years been occupied in succession by people not having, or pretending to have, any right, but who, finding the lot abandoned and unclaimed, took possession of several parts of it, as it suited their convenience, intending, as we may suppose, to hold it till a claimant should appear.

One Crysler had occupied it, or part of it, and a few years before this deed was made he gave up possession to his son, who was living upon it in October, 1848, when the defendant made the deed to Carr.

The son was examined as a witness on this trial, and swore that he knew he had no title, and went in as squatters do, meaning to take his chance, and living in a log shanty on the place.

When Dunn, the heir, came out from Scotland, he found Crysler's father on a part of the lot, and his son on another portion. On his applying to the elder Crysler the latter at once gave up possession, and when the plaintiff desired to purchase from the defendant he was told by the elder Crysler that his son had no right to the land, and that he, the plaintiff, might safely purchase from Dunn, and would have no trouble: and he did accordingly buy from Dunn about 80 acres of the land, which is conveyed by the deed in question. It turned out, however, that Crysler's son would not go out of possession as his father had done, and as it was expected he would do; and after the plaintiff took his deed he was under the necessity of bringing an

ejectment against him, which he did, and recovered possession in December, 1850, and a general verdict for the plaintiff on the several demises of Dunn and himself (Carr.). In the meantime the plaintiff suffered considerable loss and inconvenience by being kept out of possession; he had made arrangements for improving the place, and could not fulfil them; and there was evidence that his loss was not less than 50*l.*, and that he complained to the defendant, who spoke of compensating him for his disappointment.

This action was brought on the covenant, under the idea that the defendant, Dunn, being disseized in October, 1848, he had not good right, full power, and good and lawful authority to convey, and so had broken his covenant.

It was objected by the defendant's counsel that the recovery in ejectment, which was proved, and the evidence given in Dunn's title, shewed that he had right.

The learned Chief Justice of the Queen's Bench, before whom the cause was tried, directed the jury that the circumstance of a mere trespasser being in possession, or a squatter, as in this country persons acting like the Crysler are commonly called, not claiming title or pretending to own the land, did not disable the proprietor from conveying; and he left it to them to find whether, when the deed was made, Crysler was or was not in possession claiming title, for if not, Dunn had a clear right to convey. The jury were also told that, on the evidence, the plaintiff, though he had doubtless been put to inconvenience, for which perhaps he might have a remedy in some other form of action, could not be held to have a right to recover on the covenant for defect of title.

A verdict was, however, given for the plaintiff, and 50*l.* damages.

Notman, Q. C., obtained a rule nisi for a new trial without costs, on the law and evidence, and because the verdict was against the judge's charge, and the damages given excessive, and on affidavits.

Freeman shewed cause.

Notman, Q. C., contra, cited *Nash v. Ashton*, 2 Th. Jones, 195; *Skinner*, 42.

ROBINSON, C. J., delivered the judgment of the court.

The affidavits filed in opposition to this rule seem to shew much equity in the plaintiff's claim ; but they are in a great measure opposed to the statements contained in the affidavits filed on the part of the defendant. As to the law of the case, it was admitted on the argument that no example can be found of an action for breach of covenant for title having been brought on such grounds ; that is, where the grantor had really the right in him, but his grantee merely met with obstruction and delay in gaining possession. The plaintiff in this case actually has and enjoys the land. My brothers, I believe, consider, that under such circumstances, whatever other remedy he might have, he could have none upon this covenant, for that a recovery on the covenant for title should entitle the plaintiff to the whole of his purchase money back, which in this case would be absurd. I think it was not shewn that the defendant was disseized, in the legal sense of the term, when he made the deed, and that alone could disqualify him from conveying ; for that he had the title is clear ; the recovery in ejectment shews it. We think there should be a new trial without costs.

My brother Burns has given me a note of a case—*Jerrit v. Weare et al.*, 3 Price, 575—which has much application to this case. It makes strongly against the plaintiff's action on this covenant.

Per Cur.—Rule absolute for a new trial without costs

KERR ET AL. V. GORDON AND HOWSTON.

Only one defendant having pleaded, and the other having suffered judgment by default, the court ordered a new trial, where it appeared that, although the rule was moved on behalf of one defendant only, the other assented to the application.

Trover for pine and oak timber.

Pleas by the defendant Gordon : 1st, Not guilty ; 2nd. Plaintiffs not possessed ; 3rdly, That the timber was the property of him, Gordon.

Plaintiffs took issue.

Howston appeared in person, and suffered judgment to go against him by *nil dicit*.

The learned judge (Draper, J.,) before whom the case was tried, did not consider that the evidence warranted a verdict in favour of the plaintiffs, but nevertheless left it to the jury with observations unfavourable to the plaintiffs' case, reserving leave to move for nonsuit.

A verdict was however rendered for the plaintiffs against Gordon for 204*l.*, and damages were assessed against Howston at the same sum.

Lyons obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered for the defendant Gordon, pursuant to leave reserved, or why a new trial should not be had between the parties, or between the plaintiffs and the defendant Gordon, the verdict being contrary to law and evidence, and on affidavits.

This application was supported by, and founded on, an affidavit made by the defendant Howston before the term, and filed at the time of making the motion.

Wilson, Q. C., shewed cause, and cited *Storer et al. v. Hunter*, 3 B. & C. 368; *Dunning v. Gordon* 4 U. C. R., 399; *Doe dem. Dudgeon et al. v. Martinet et al.*, 13 M. & W., 811; *Belcher v. Magnay*, 9 Jurist, 475; *Price v. Harris et al.*, 10 Bing, 331; *Davis v. Lennon et al.*, 8 U. C. R., 599.

Lyons, in support of the rule, cited *Garbutt et al. v. Watson*, 5 B. & Ald., 613.

ROBINSON, C. J., delivered the judgment of the court.

We have considered the evidence and the affidavit filed, and are of opinion that there ought to be a new trial on the merits, with costs to abide the event.

It is objected that a new trial cannot be granted upon issues applying only to one of the defendants, but we think there is no difficulty under the circumstances of this case. This is not a case in which one defendant has been acquitted, and another, who was convicted, is asking for a new trial. The effect will no doubt be to open the assessment of damages in regard to Howston, which could not be done perhaps regularly without the rule nisi being served upon him, or without its appearing that he is a party to, or assenting to the application. But we see that he is

concurring in the application, for he makes an affidavit in support of it, and in which he complains of the verdict and that shews sufficiently that he does not desire the damages assessed against him to remain.

The motion was in fact made on behalf of both defendants, though the rule nisi has the name of counsel to it as if moved on behalf of Gordon only.

The learned judge who tried the cause was strongly impressed with the opinion that the evidence did not support the plaintiff's case, and we also think so.

Per Cur.—Rule absolute for new trial; costs to abide the event.

DOE DEM. O'CONNOR AND ROUSE V. MALONEY.

Where an estate will become legally vested before the passing of 12 Vic. ch. 197, that the statute will not operate to take it away from the possessor, and entitle the heir-at-law although an alien.

An action of ejectment for the south half of lot 30 in the 3rd concession of Malden; tried at Sandwich before Mr. Justice Sullivan.

At the trial O'Connor was not proved to have any title. Rouse, the other lessor of the plaintiff, was shewn to have been born in the United States, and always to have remained there, and to have been only on one occasion on a visit to this province, about 1821, except that in the war of 1812 he came into Canada as one of the enemy's army. The patentee of the crown, his father, died in 1826, in possession of the land, and his widow and her family had been in occupation ever since.

The jury found a verdict for the defendant.

Becher obtained a rule nisi for a new trial on the law and evidence, or for misdirection, or for the discovery of new evidence: costs to abide the event. He referred to statute 12 Vic. ch. 197, and cited *Doe Chandler v. Tesseir*, 6 U. C. R., 216.

A. Prince shewed cause, and cited *Dwarris on Statutes*, 724, 711, 688; *Doe dem. Thomas et al. v. Acklam* 4 D. & R. 394; *Doe dem. Stansbury v. Arkwright*, 5 C. & P. 575; *Hansard's Law of Aliens*, page 98.

ROBINSON, C. J., delivered the judgment of the court.

It is plain on the evidence that there was no right shewn to recover on either demise. No title was proved to be in O'Connor.

The only question can be whether our statute 12 Vic. ch. 197, sec. 12, has the effect of vesting the title in the lessor of the plaintiff Rouse an alien, always resident in a foreign land, and still residing there. I think clearly it has no such effect, for that would be contrary to the words of the clause, which are, "that from and after the passing of this act every alien shall have the same capacity to take, hold, possess, enjoy, claim, recover, convey, devise, impart, and transmit real estate in all parts of this province, as natural-born or naturalized subjects of her Majesty, *in the same parts thereof respectively*. Provided always, that nothing herein contained shall alter, impair, or affect, or be construed to alter, impair, or affect in any manner or way whatsoever, any right or title legally vested in or acquired by any person or persons whomsoever, previous to, or at the time of the passing of this act."

On the death of the grantee of the crown, in 1826, the estate became vested in his heir, if he had any capable of inheriting, which heir could not be the present lessor of the plaintiff, for the reason I have stated; and the estate having vested by operation of law long before the passing of this recent statute, in whoever was legally entitled, the Legislature did not mean that it should be taken from him by that statute and given to another.

The statute is in such broad terms that I can hardly persuade myself the Legislature intended it to have such an effect as it seems it must have even prospectively—that is, in regard to the estates of persons dying after its passing; but that an alien should be allowed under it now, for the first time, and more than twenty years after his father's death, to take away from a subject the estate which had legally vested in him, is what the Legislature clearly does not mean.

There is no ground for a new trial furnished by the plaintiff's affidavits; no surprise shewn; nor any allegation of a new fact which could alter the rights of the parties.

It is not determined by the verdict that the defendant owns the land, but only that the plaintiff has not shewn a good title.

Per Cur.—Rule discharged.

COUNTER V. MORTON.

Plaintiff leased certain premises to the defendant for the term of one year, with the privilege of holding the said premises for an indefinite time, on certain conditions, one of which conditions was that three months' notice in writing should be given prior to leaving the premises, and prior to the termination of a full year, by either party so inclined.

Held, that by the terms of the above agreement, defendant was bound to give three months' notice of his intention to quit at the end of the first year.

Action on a lease from the plaintiff to the defendant, of certain buildings for the term of one year from the 30th of December, 1848, to the 31st of December, 1849, with the privilege of the wharf in common; and also of holding the said premises for an indefinite time, on the condition stated hereafter, &c. One of these conditions was as follows :—

“Three months' notice in writing prior to leaving the premises and prior to the termination of a full year, to be given by either party so inclined.”

A verdict was taken for the plaintiff for 66*l.* 12*s.* 6*d.*, subject to be reduced to 25*l.*, being the sum due on 31st December, 1849, if the court should be of opinion that a notice of defendant's intention to quit on 31st December, 1849, was unnecessary, and not imperative under the terms of the lease; but the verdict to stand, should the court be of opinion that the defendant was bound by the lease to give three months' notice of his intention to quit on that day.

Vankoughnet, Q. C., for the plaintiff, cited *Thompson v. Maberly*, 2 Camp. 572; *Doe dem. Chadborn v. Green*, 9 A. & E. 658.

J. A. Macdonald, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

The defendant, we think, was bound by this agreement to give three months' notice. It is the plain intention of the agreement that one year's occupation only was to be certain,

and that the rest should depend upon the will of either party. The language of the agreement is clear to that effect, and it was reasonable to place the matter on that footing, for otherwise one party or the other might have been taken by surprise, and put to inconvenience by the other terminating the arrangement without previous notice.

We are of opinion that the plaintiff is entitled to a verdict for the larger sum.

O'NEILL V. CARTER.

In an action against a surety who stipulates for the return of certain goods on request, it is not a sufficient excuse for the want of such request to allege that when the plaintiff required the goods, the principal was out of the province.

Declaration—That in consideration that the plaintiff at the request of the defendant would let to hire a certain piano-forte to one Hoy, to be held, &c., until the plaintiff *should require a return of the same*, at a certain sum monthly, until the said piano-forte, *should be so returned*, the defendant then promised the plaintiff to be answerable to him for the due return of the said piano-forte, &c., *whenever the said Hoy should be thereunto requested by the plaintiff*, &c.

The plaintiff averred that afterwards, &c., &c., he would have demanded from the said Hoy the return of the said piano-forte, *but the said Hoy was not then in or residing within the Province of Canada, or within the jurisdiction of this honorable court, whereby the said plaintiff could not require or demand a return thereof from the said Hoy*, and that the said piano had not been returned.

Defendant demurred to so much of the declaration as relates to the non-return of the piano, because no sufficient excuse is alleged for not demanding a return, nor any averment of a demand

Burton, for the demurrer, cited 1 Saund. 32 and 33, n. 2; *Sicklemore v. Thistleton*, 6 M. & S. 9.

J. Duggan, contra, cited *Walton v. Mascal*, 13 M. & W., 452.

ROBINSON, C. J., delivered the judgment of the court.

The defendant is entitled to judgment, we think, on this demurrer, otherwise the plaintiff might have sued the

defendant immediately, if the piano was not returned, merely because Hoy had set out on a journey the day after hiring it.

When a surety only stipulates that the principal shall return goods upon request, if the party entitled to re-claim does not request them, he can have no right of action against the surety. If a request has become impossible, we do not say that there is therefore no recourse against the surety, though no authority has been cited for allowing the plaintiff in such a case to aver facts which would dispense with notice. We cannot, however, hold as a legal principle that Hoy having left the province, though but for a month or a week, made the giving notice within the intent of the agreement impossible.

Per cur.—Judgment for the defendant on demurrer.

RICHARDSON V. PHIPPEN.

Replication de injuria.

Declaration on a note made by K. payable to defendant or order, and by defendant indorsed to plaintiff.

Plea.—That the note was made by K. and indorsed by defendant to the plaintiff, to enable the plaintiff to raise money upon it to be delivered to K., with which money K. was to buy wheat, and to manufacture flour from it, which flour was to be consigned to the plaintiff that he might raise money thereon for retiring the note: that the said note was indorsed, the money raised, the wheat bought, and the flour made from it consigned to the plaintiff for the said purpose: that the plaintiff sold the flour, and with the proceeds paid the note when due: and that the defendant received no value for the note except as aforesaid.

The Court held the above defence to be matter of excuse, and not in discharge, and therefore that a replication de injuria was good.

Declaration on a promissory note, made by one Kerr, payable to the defendant or order, and indorsed by the defendant to the plaintiff.

The defendant pleaded that Kerr made the note, and the defendant then indorsed the same to the plaintiff for a special purpose—viz., to enable the plaintiff to raise money upon it, which he was to deliver to Kerr, with which money Kerr was to buy wheat and to manufacture flour from the wheat to be consigned to the plaintiff, that he might raise money thereon for retiring the note when due: that the plaintiff held the note for that purpose, and under that

arrangement: that the plaintiff indorsed the note and raised money for Kerr for the purpose aforesaid, who bought wheat for it, and made it into flour, which flour he consigned to the plaintiff for the purpose of selling the same and taking up the note: that the plaintiff got the flour and sold it, and with the proceeds paid the said promissory note on the day it became due: that the defendant received no value for the note except as aforesaid: and that by reason of the premises the plaintiff at the time of commencing this suit held, and now holds the same, without any consideration, and seeks to enforce payment unjustly, and in violation of the understanding, &c.

Plaintiff replied *de injuria*.

The defendant demurred, because the defence set up by the plea is not matter of excuse, but in discharge, and should therefore having been specially traversed.

Wallbridge, for the demurrer, cited *Crisp v. Griffiths*, 2 Cr. M. & R. 159; *Solly et al. v. Neish*, 2 Cr. M. & R. 355.

Richards, contra, cited *Robinson v. Little*, 6 D. & L. 246; *Buttidgeig v. Booker et al.*, 1 Prac. Rep. 444.

ROBINSON, C. J., delivered the judgment of the Court.

The plea was not excepted to on the argument. It does not state in terms that the plaintiff paid the note to the holder thereof, but merely that he paid it on the day it became due; and it is meant, I suppose, that we should understand by the plea, that the defendant having, for the accommodation of the plaintiff indorsed the note to the plaintiff to enable him to raise money on it and buy wheat, from the proceeds of which the plaintiff was to take up the note when due, the purpose of the defendant's indorsement was answered, for that the plaintiff did get money and buy wheat through Kerr, and with the proceeds of the wheat took up the note; and that he is now fraudulently turning round upon this accommodation endorser, as if he were liable to him as indorsee. Of course if that be true it is a good defence, but it is clearly matter of excuse, not of a legal discharge. The defendant does not pretend that either he or the maker of the note paid it at maturity: his indorsee

having paid it would not, in an ordinary case, be any discharge of his liability—on the contrary it would entitle such indorsee at once to turn back upon him and sue him; and the defendant's excuse for not paying him resolves itself into the fact of his being an indorser without value and for the plaintiff's accommodation, and on that ground only not liable to him. This has been always held to be a defence of that kind, that the plaintiff may reply to it in the general form that he has used here.

Per Cur.—Judgment for the plaintiff on demurrer.

IN RE THE EXECUTORS AND DEVISEES IN TRUST OF THE HON.
ROBERT DICKSON v. THE MUNICIPAL COUNCIL OF THE
VILLAGE OF GALT.

The municipal council of a village have authority to impose the performance of statute labour, or a tax in lieu thereof, only on those inhabitants who are not otherwise assessed.

Vankoughnet, Q. C., obtained a rule nisi to quash a by-law of the Municipal Council of the village of Galt, as illegal, or so much of it as relates to persons being made liable to statute labor who are otherwise assessed on the assessment rolls of the said village.

The by-law in question is No. 29, and was passed on the 9th May, 1851. It recites, that by the statute of this province 13 & 14 Vic., ch. 67, sec. 22, every male inhabitant of any city, incorporated town or village, between the age of 21 and 60, not otherwise assessed, and not exempted from statute labor, shall, instead of such labour, be taxed ten shillings yearly; and that the municipality of any city, town, village, or township, may by by-law, to operate generally and ratably, reduce, and at their discretion increase the number of days' labour to which any such party on the assessment roll shall be liable.

And it enacts, that every male inhabitant between the age of 21 and 60, not otherwise assessed, and not exempted &c., shall, instead of statute labour, pay a tax of ten shillings.

And further, that every person assessed on the assessment

roll at not more than 3*l.* annual value shall be assessed at two days' labour; if more than 3*l.* and not over 6*l.*, three day's labour, and so on: giving a graduated scale up to persons assessed at 60*l.* annual value, and providing that for every 12*l.* above 60*l.* one additional day's labour shall be imposed.

And that every person so assessed shall pay in commutation of statute labour 1*s.* 3*d.* per day.

Then follows a clause providing for enforcing the payment by distress of the statute labour commutation money which seems intended to apply to both classes: that is, to those *not otherwise* assessed, and who have ten shillings to pay; and to those who, being otherwise assessed, have also to pay in commutation of statute labour 1*s.* 3*d.* for every day at which they shall be rated, according to the scale given in the by law.

It was objected that, by law, it is not competent to the municipal council of any city, town, or village, to impose statute labour, or any tax in lieu thereof, on persons who are assessed for the general purposes of a village, but only on persons not so assessed.

Irving shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It is clear, we think, that the 22nd clause of 13 & 14 Vic., ch. 67, does not authorize the imposition of statute labour by a by-law to be passed by the municipal council of any city town, or village, except upon inhabitants not otherwise assessed.

The scale of days' labour imposed by that clause on inhabitants otherwise assessed is expressly confined to the cases of inhabitants of *any township*. And the proviso towards the end of that clause, under which proviso it is that the council of Galt have assumed to act in passing the by-law now in question, does not in terms or impliedly vary from the former part of the clause in that respect; for it gives to the council of any city, town, village, or township, power to make by-laws to operate generally and ratably reducing, or at their discretion increasing the number of days' labour to which any such party *rated on the assessment*

roll or otherwise is made liable by that act: that is, they may by their by-law, increase or reduce the 10s. by that act imposed on inhabitants of villages not otherwise assessed, or increase or reduce the number of days fixed by that act for the inhabitants of townships who are *otherwise assessed*.

There is no inconsistency in the clause. We have only to consider the two classes of persons—assessed, and not assessed, and also the different cases of townships and cities, towns, and villages, and apply to each what is evidently meant for each; and there is no repugnancy; for there is something on which each of the expressions used can consistently attach.

There is nothing in the 28th division of the 31st clause of 12 Vic. ch. 81, even if that clearly applied to villages also, at variance with this construction; for that only gives power to make by-laws for enforcing the performance of statute labour, or payment of commutation, in those cases where the burthen has been legally imposed.

We apprehend the law has been generally taken to be as we state it to be; and that the streets of villages are left to be made and repaired out of the public fund raised by general rate upon the inhabitants, so far at least as the assessed inhabitants are concerned, and that they are not to be subjected to a separate tax for statute labour.

We therefore make the rule absolute for quashing so much of the by-law as relates to statute labour or payment of any commutation therefor, to be exacted from the inhabitants of the village of Galt who are or may be otherwise assessed in that village.

Per Cur.—Rule absolute with costs.

MCDONELL V. MCDONELL.

Where a title is pleaded by purchase at sheriff's sale under a *fi fa.*, the judgment supporting such *fi. fa.* should be set out, and it should be averred that the sheriff seized while the writ was in force.

Trespass—*quare clausum fregit*.

The third plea set up as an answer to the plaintiff's

declaration, that one Donald McGillis was seized in fee of the close before the said time, when, &c., and that before the trespass—viz., on 4th October, 1846—(without saying that he was then seized, &c.) he sold and conveyed to one Alexander Wilkinson in fee, who entered and was possessed, and that while he was so possessed and before the trespass, Donald McDonald, Esquire, then being sheriff of the Eastern District, by virtue of a writ of *fiery facias* issued out of the Queen's Bench, and tested 2nd November, 6 Wm. IV., at the suit of one John B. Gates, and to the said sheriff directed, commanding him that of the lands, &c., of the said Alexander Wilkinson he should cause to be made 250*l.*, sold the said close to one Alexander McDonell Greenfield. The plea then averred a conveyance by the Sheriff by deed to Alexander McDonell Greenfield, and a sale and conveyance by him to another person, who entered. That the plaintiff, claiming title under colour of a conveyance from McGillis to him before the deed to Wilkinson, entered; and then justified entering upon him by command of the grantees of Alexander McDonell Greenfield, and as their servant.

Demurrer to this plea, because the defendant does not shew any title to the premises in himself, nor does he otherwise deduce any legal title from the said Donald B. McGillis.

McDonald, Sol. Gen., for the demurrer, cited Ramsbottom et al. v. Buckhurst, 2 M. & S. 565; Bullers N. P. 104; Doe dem. Bland v. Smith, Holt, 589.

Vankoughnet, Q. C., contra, cited Doe Spafford v. Brown et al., 3 U. C. R. O. S. 90; Adams et al. v. Kingsmill, 1 U. C. R. 355.

ROBINSON, C. J., delivered the judgment of the court.

The defendant in the third plea, making title against the plaintiff under a purchase made at sheriff's sale under a *fi. fa.* against Wilkinson, shews no judgment against Wilkinson to support the writ, though neither the plaintiff nor defendant is privy to that judgment, if there was one.

The plea does not aver, either, that the sheriff sold or seized while the writ was current, that is, before its return;

and it does not state that the execution was to make money for satisfying any judgment, or that any judgment had been recovered, but merely that a writ of *fi. fa.* had been issued at the suit of Gates, commanding the sheriff to make 250*l.* of Wilkinson's lands and tenements, neither stating the authority for such command—to wit, the judgment—nor the object of it—namely, to levy money to satisfy a debt.

The statement imports only, that at Gates's instance a writ was sued out commanding the sheriff to sell Wilkinson's lands. Such a writ would be void on the face of it.

We are of opinion that the plaintiff is entitled to judgment on the demurrer.

Judgment for the plaintiff on demurrer.

MOORE ET AL., ASSIGNEES, &C., V. COOK.

Assumpsit (by the assignees of a bankrupt) on a promissory note made by defendant, payable to one *W. R. Fellows*, and endorsed by *W. R. F.* to the bankrupt before his bankruptcy.

Plea 1st. That *R. W. Fellows* did not endorse. 2nd, Plea—that defendant paid the note when it became due, but not stating to whom. 3rd Plea of payment before action, to bankrupt before his bankruptcy, in full satisfaction, &c., of all *causes and rights of action*, &c.

Held on demurrer:—1st plea bad, for the variance in the name. 2nd and 3rd pleas good

Declaration—Assumpsit by plaintiffs as assignees of one Baker, a bankrupt, against the defendant, as maker (before the bankruptcy of Baker) of a note, whereby he promised to pay to one *W. R. Fellows* or order the sum, &c. Averment of indorsement by the said *W. R. Fellows* of the said note to the said Baker before his bankruptcy, and of promise by defendant to Baker before his bankruptcy to pay the said note, &c. Averment of promise by defendant to the plaintiffs (as assignees of Baker) after his bankruptcy, to pay the said note on request.

Breach—That defendant has not paid the said money, &c., either to Baker before his bankruptcy, or to plaintiffs as assignees as aforesaid, since said bankruptcy.

1st Plea.—That *R. W. Fellows* did not indorse the said note, &c. 2nd plea.—That defendant paid the note when due: verification. 3rd plea.—A plea of payment to Baker

in full satisfaction and discharge of all the *causes and rights of action* in the said first count mentioned, and which payment Baker, before his bankruptcy, accepted of and from, &c., in full satisfaction, &c. Verification.

Demurrer to 1st plea: Because the defendant therein states, &c., that *R. W. Fellows* did not endorse, &c., as in the declaration alleged, whereas in truth and in fact no such indorsement is averred, &c.; and that the defendant endeavours to tender an immaterial issue, &c.

Demurrer to 2nd plea: Assigning for causes that it is not alleged in the said second plea that the said payment was made to the plaintiffs or to some other person or persons entitled to receive the same; and because it is not shewn in the said plea who was the holder of the note at the time of such payment; nor that payment was made to the holder thereof, nor to any one entitled to receive such payment, nor in fact to any person whatever, &c.

Demurrer to third plea: Assigning for causes that it is not shewn in said plea that at the time of the payment therein mentioned to Baker the said Baker was the holder of the note, or was in any way entitled to receive payment of the same, or to accept the said sum of money in satisfaction, &c.; and because it is not shewn in said plea whether such payment was made, &c., before, or at the time, or after the maturity of the said note, &c.; and because it is not shewn in said plea that such payment was made before the commission of an act of bankruptcy by Baker; or if after the commission of such act of bankruptcy, then that such payment was made *bona fide*, and without notice or knowledge of such act of bankruptcy, as required by the statute in such case made, &c.

Joinder in demurrer.

Logie for demurrer.—In the first plea the variance in the name is fatal. The second plea is also bad, for it is not said who was the holder.—*Steele v. Harmer et al.* 14 M. & W. 831. The third plea is also bad; for it is not stated who the holder was at the time of payment; or whether the note was paid before or after, or at maturity.

Eccles, contra.—The first plea is good, and may be read

as if the Christian names were not inserted: the word "said" shews what was meant. As to the second plea, it must be presumed, taking the declaration and plea together, that the note was paid to Baker, and before bankruptcy. The third plea, he insisted, was clearly good.

ROBINSON, C. J., delivered the judgment of the court.

We consider the first plea bad for the variance in the name, there being nothing to denote that the defendant is speaking of the same person. We give leave to amend that plea.

As to the second plea, it seems to be sustained by precedent, and so also does the third.

I refer to 3 Chitty's Pleading, 168, which contains forms from which both of these pleas seem to have been taken.

At least, we see no difference between the case of an acceptor pleading payment, which is the precedent referred to, and the maker of a note, which is the case before us; nor any reason why, if the other precedent of a plea of satisfaction after breach, given in Mr. Chitty's book, be good, the third plea of this should not equally be good: for the statement of damages, laid in this case in the conclusion of the declaration, forms in effect part of the first count; and if so, then satisfaction of all causes of action stated in that count will include not only the sum payable by the note, but also damages for non-payment. We see nothing that should make this a bad plea, if the precedent I have referred to be good; and as the objections are formal, we shall not judge them bad when they have those precedents to support, and no authority has been cited to shew them insufficient.

Judgment for plaintiffs on demurrer to the first plea, and for defendant on demurrer to the second and third pleas.

METCALF QUI TAM. V. REEVE AND GARDNER.

Justices of the peace, before whom a conviction is made, are not *jointly* liable under 4 & 5 Vic. ch. 12, for not returning the same.

A declaration charging that the return was not made to the *next ensuing quarter sessions* of the peace is bad—the statute requiring a return to the next ensuing *general quarter sessions*.

Qui tam action under 4 & 5 Vic. ch. 12, against two

defendants Reeve and Gardner, as justices of the peace, for not returning a conviction.

The declaration, after stating the conviction, alleged that the defendants did not make a return of the said conviction under their hands, to the next ensuing *quarter sessions of the peace*.

Special demurrer by the defendant Reeve, assigning several causes, two of which were: that the defendants are not jointly but severally liable; and, that it is not alleged that the defendants did not make the return to the next ensuing *general* quarter sessions of the peace.

Adam Wilson, Q. C., for the demurrer. *C. W. Lount*, contra.

ROBINSON, C. J., delivered the judgment of the court.

We think this declaration is bad, for it treats the defendants as being liable jointly in one penalty, whereas it is by the statute made the several duty of each of the justices joining in a conviction to report it to the sessions.

They cannot commit a joint offence and be subject to one penalty, because neither transmitted it.

And it is not charged that the return was not made to the next "*general* quarter sessions," but only that it was not returned to the next "*quarter sessions*," which may mean a different court, and one to which there was no necessity to make the return.

The distinction between courts of quarter sessions and courts of general quarter sessions is stated by Sergeant Hawkins. We think there are some other of the exceptions which might be found entitled to prevail.

Judgment for the defendant Reeve on demurrer.

ROGERS V. LAKE.

Debt on bond conditioned to make a deed of 200 acres of land, "which is to be drawn by a U. E. right, due to me."

Held, not necessary for the obligee to tender a deed for execution.

Held also, and the obligor was bound to make a deed within a reasonable time.

Debt on bond, conditioned as set out an oyer, that the defendant should "well and truly make and execute, or cause to be well and truly made and executed, a good and sufficient deed in the law, for two hundred acres of land,

which is to be drawn by a U. E. right, due to me as the son of a U. E. Loyalist, I having received fifteen pounds, it being a payment to my full satisfaction for the same."

2nd plea—that the plaintiff did not tender any deed to the defendant for execution.

3rd plea—that the defendant had not drawn or obtained the land in the condition mentioned.

Demurrer to the second plea—because the plaintiff is not bound by the condition of the bond to tender a deed to the defendant for execution.

And to the third plea—because by the condition the defendant was bound to make a deed within a reasonable time, and it is not averred that a reasonable time had not elapsed.

M. C. Cameron, for the demurrer.

ROBINSON, C. J., delivered the judgment of the court.

The pleas are both bad. The second plea assumes that it rested with the plaintiff to prepare and tender a deed, but it is not so on a condition such as this is.

The third plea is, that the defendant has not at any time drawn or obtained the two hundred acres of land in the condition mentioned, or any land whatever by his U. E. right, If that were a defence, then the defendant need never have given himself any trouble about the matter, though he keeps the 15*l.* paid to him as the consideration for the 200 acres which he was to obtain and convey.

He must be supposed to have held himself out as in a condition to draw two hundred acres of land as the son of a U. E. Loyalist; and he engaged to make a good and sufficient deed of two hundred acres, *which are to be drawn* by him in that capacity. If he had no such right, or will be at no pains to avail himself of it, then he cannot be relieved from the penalty of his bond. It is true no time is set within which he is bound to do this, but the only effect of that is, that if a reasonable time has not elapsed under the circumstances of the case he should have pleaded that, and he has not done so. This is not a case in which an obligor has his whole life to perform the condition in.

Judgment for plaintiff on demurrer.

CLANDINAN V. DIXON ET AL.

*What wilful misconduct on part of sheriff—liability of his sureties—3 Wm.
IV. ch. 8.*

The sheriff having availed himself of the Interpleader Act to try a disputed claim to goods, it was a part of the arrangement directed by the court on making the interpleader order, that in the meantime the sheriff should sell the goods, taking satisfactory security for the payment. The sheriff did sell and took as security an undertaking from parties not resident within the jurisdiction of the court, which security he subsequently offered to assign to the now plaintiff, in whose favour the issue had been found, but it was declined. Being subsequently pressed by plaintiff to give him the benefit of his writ, he made a return of *nulla bona* : and

Held, that this amounted to such wilful misconduct as rendered the sheriff and his sureties liable.

This was an action against the sheriff and his sureties.

In 1848 George and Charles Clandinan were getting out timber in the District of Bathurst, on an agreement with Brooke & Gray, who were to make them certain advances to enable them to proceed, which agreement contained stipulations intended to secure Brooke & Gray for their advances by giving them a lien upon and control over the timber, if not the legal property in it, as fast as it should be made. Brooke & Gray, after advancing 600*l.* or 700*l.*, either became unable or unwilling to advance more, and George and Charles Clandinan had to look for assistance in other quarters. Their father, Samuel Clandinan, who is suing as plaintiff in this cause, then advanced them 80*l.* and upwards as he alleged, and to secure himself he took some kind of a bill of sale of the timber which they had made. Afterwards Brooke & Gray having got into difficulty, their assignees became pressing, and Samuel Clandinan was afraid of the timber being taken out of their hands by which he would lose his debt, and he consulted counsel who looked upon his bill of sale as rather in the light of a lien than a sale, and that it could not, as he thought, be relied on for passing the property to him, and recommended him to take a confession of judgment from George and Charles Clandinan, his sons, for his debt, which he did; and judgment was entered on it, and execution issued, and in January, 1849, the timber was seized as it lay frozen in the river Mississippi. Then Brooke & Gray, or rather their assignees in their behalf put in a claim to the timber, insisting it was theirs under

their agreement with George and Charles Clandinan, and they forbade the sale. The sheriff asked Samuel Clandinan for indemnity, but he could not get it; and he then availed himself of the Interpleader Act, and an issue was tried in which the point to be determined was, whether at the time of the seizure by the sheriff the timber did or did not belong to Bryson, Redpath, and others, assignees of Brooke & Gray, who had claimed it from the sheriff. This issue was tried in the autumn of 1849, and several legal exceptions being taken upon the trial, the case was decided in Michaelmas term, 1849, when the assignment or instrument which Brooke & Gray had taken from George and Charles Clandinan, on which Bryson & Redpath's title depended, was held void for usury: 4 per cent. being stipulated for in that agreement in addition to legal interest on all moneys advanced.

This annulled the only claim that had been made on the timber on which Samuel Clandinan had directed to be sold under his execution. In the meantime, however, as the timber was receiving damage from continuing so long unsold after being made, it was part of the arrangement directed by the court upon the occasion of making the interpleader order, that the timber should be sold, upon the sheriff taking satisfactory security for the proceeds, which were to abide in his hands the decision of the interpleader case.

The sheriff accordingly allowed the timber to be sold through the agency of Redpath, and when the event of the interpleader case was known, he offered to assign to this plaintiff the security which he had for the proceeds of the timber: but the plaintiff's attorney declined accepting it, because it was not a regular security, being an undertaking by persons not resident within the jurisdiction of this court.

The sheriff not having paid the money over to the plaintiff on his *fi. fa.* (under which he had seized in January, 1849), and the claim of Brooke & Gray's assignees which had stayed the sale being now put an end to, he was ruled to return the writ, and made a special return, such as the

court held he was not, under the circumstances, at liberty to do; and an attachment being moved, and the sheriff being pressed by this plaintiff to give him the benefit of his writ, he at length, in April, 1850, made a return of *nulla bona* to the plaintiff's *fi. fa.*, under which he had seized in 1849, and was proceeding to sell, when he was only stayed by a claim which, some months before he made the return complained of, had been judicially determined to be invalid.

It appeared also on the trial at Perth, before Draper, J., that the sheriff had allowed the proceeds to go into the hands of Redpath, and thus effect has been in fact given to the claim of Brooke & Gray's assignees which this plaintiff had in the proper legal manner contested, and on which a decision had been given in his favour.

The jury found a verdict for the plaintiff, damages 136*l.*

In Easter term the *Solicitor General* moved for a new trial on the law and evidence, and for misdirection, and on an affidavit of surprise.

Phillipotts now shewed cause.—The sheriff's return is clearly inconsistent with his former acts, and constitutes that kind of wilful misconduct which renders him and his sureties liable in this action.

Richards, contra.—It is evident that the sheriff acted *bona fide*, and though he might be liable at common law, yet his sureties cannot be responsible under a covenant which is only intended to guard against wilful misconduct. *Bradbury v. Adams & Graham* (a); *O'Neil v. Hamilton, sheriff, &c.* (b). It was a misdirection of the learned judge to say that *bona fides* was not in issue.

ROBINSON, C. J., delivered the judgment of the court.

It seems from these facts that the sheriff is doing what the courts in England set their faces against—namely, lending his aid to one of the parties, and making himself, as it were, a party in the case when he should stand indifferent between them, and execute his duty indifferently, according to law and the directions of the court. He is sued for a false return made to the plaintiff's *fi. fa.*

(a) 1 U. C. R. 538.

(b) 4 U. C. R. 294.

The question is, whether this was or was not that kind of wilful misconduct by the sheriff which subjects him and his sureties to an action on their covenant, or whether the plaintiff, if he has any remedy, has only a remedy by action against the sheriff on his strict legal liability, under the circumstances, at common law, and independent of the covenant, which is plainly intended only to indemnify sureties against his wilful defaults, his culpable negligence, or misfeasance in his office.

We consider that, after the decisions of the interpleader case, to which he was bound to submit, and after he had so far submitted as to offer to assign to this plaintiff the security, whatever it was, which he had taken for the proceeds of the timber, it was wilful misconduct in him, either because he had taken insufficient security and so could not collect the money, or because he desired, whether upon indemnity from Bryson and Redpath or otherwise, to give them a chance to retain it in satisfaction of a claim adjudged to be usurious, to return *nulla bona* to the plaintiff's *fi. fa.*, and to attempt to disprove George and Charles Clandinan's property in the goods, which no one else is disputing.

We think, therefore, the rule must be discharged (a).

IN RE LATHAM, AN ATTORNEY, v. THE LAW SOCIETY.

3 Vic. ch. 2—8 Vic. ch. 39—13 & 14 Vic. ch. 51—Fees for attorney's certificate.

The penalty of 4*l.* imposed by statute, where an attorney omits to take out his certificate in proper time, is payable in each of the courts, and is not the aggregate amount of the penalty incurred in the three courts for such neglect.

Quere, as to the amount to be paid by an attorney for his certificates, where he has allowed the time specified for the Common Pleas and Chancery Courts to pass, but is in time to take out his certificate for the Queen's Bench.

A rule nisi was moved for on Hugh Gwynne, Esquire, to shew cause why a mandamus should not issue, directing him to grant unto the said Henry Latham a receipt for his

(a) See also *Clandinan v. Dickson et al.*, 8 U. C. R. 281; and *Bryson et al. v. Clandinan*, 7 U. C. R. 198.

certificate in the Court of Chancery, and to reimburse to the said Henry Latham the sum of 1*l.*, alleged to have been erroneously paid by the said Henry Latham to the said Hugh Gwynne, Esquire.

This was moved upon an affidavit of Mr. Latham, setting forth that he neglected to take out his certificates to practice in the three courts of Chancery, Queen's Bench, and Common Pleas, on the 20th August *last* (1851), as required by the statute, from an impression that they were to be taken out in the term following: that on the 27th August, 1851, he applied to Mr. Gwynne for his certificates, and tendered 4*l.* as required by the statute, but was refused, unless he would pay 9*l.*, being 1*l.* for the Queen's Bench, and 4*l.* for each of the other courts: that he paid 4*l.* and 1*l.*, and refused to pay the other 4*l.*, whereupon Mr. Gwynne would only give certificates for the Queen's Bench and Common Pleas, but not for the Court of Chancery: that on the 29th August, 1851, he demanded from Mr. Gwynne his certificate for the Court of Chancery and restitution of 1*l.*, which Mr. Latham insists has been over-paid by him, but was refused both.

On 7th June, 1851, the Law Society made a rule, which the judges approved of, as visitors, under the statute 13 & 14 Vic. ch. 51, sec. 9, as follows: "that after 1st August, 1851, every attorney of the Queen's Bench and Common Pleas, and solicitor in Chancery, being desirous of practising in the said several courts, or in any of them, who shall, on or before the 20th day of August, 1851, and in each successive year, pay to the treasurer of the society the sum mentioned in the scale to the said rule subjoined, shall be entitled to a receipt from the treasurer specifying the courts in respect of which such sum shall be paid, authorizing such attorney or solicitor paying the same to obtain a certificate of license to practice in such courts respectively, up to the 20th August in the year next following such payment; and that every attorney or solicitor who shall not pay his annual certificate fees on or before the 20th day of August, in each succeeding year, shall be liable to pay the further sum of 1*l.* 5*s.* for license to practice in the Court of Queen's

Bench, besides the fees hereby required for license to practice in the said Courts of Common Pleas and Chancery.

SCALE.

For the Courts of Queen's Bench, Common Pleas and;			
Chancery	£2	0	0
For any two of the said Courts	1	10	0
For any one of the said Courts separately	1	0	0

"Provided that all attorneys and solicitors not complying with this rule shall be liable to the statutory penalties imposed for non-payment of certificate fees."

A. Wilson, Q. C., in moving this rule, contended that the penalty mentioned in the statutes 3 Vic. ch. 2, 8 Vic. ch. 39, and 13 & 14 Vic. ch. 51, should only be paid once for all the three courts, and was not payable *quoad* each of the courts.

ROBINSON, C. J., delivered the judgment of the court.

It is to little purpose to consider what the Law Society intended should be the effect of their rule in regard to the penalties imposed by the provincial statutes in case of default of payment at the time, or what may in fact be the fair construction of their rule in that respect, because they cannot overrule the statutory enactment, no power being reserved to them to dispense with or vary the penalty in case of delay; and they have been careful to declare that they do not assume to relieve against any of the statute penalties.

Then it stands thus: The attorney has let the proper day go by for taking out his certificate to practice in Chancery and in the Common Pleas, and so has to pay for his certificate in respect to each of those courts 4*l.* before he can get his certificate; for the three statutes form perfectly independent provisions in regard to each court respectively.

He is not yet too late, so far as the provincial statute is concerned, in applying for his certificate for this court, and that he can therefore have on paying the 1*l.* mentioned in the scale.

Nothing more can be exacted for this year in respect to that certificate, according to the terms of the order; and there may be room for question whether in future years

the right to exact 25s., in addition to the 1*l.*, when the attorney applied within the time limited by the statute, but after the 20th August, would stand on clear ground.

I do not see how, according to the scale in the Society's rule, more than the third part of 2*l.* can be rightly exacted for the certificate to practice in this court, where the attorney comes in time, according to the statute 3 Vic. ch. 2, because, being made by the other statute to pay the highest sum of 4*l.* in consequence of the lateness of the application in respect to each of the other courts, it would seem that he should be looked upon in the same light as if he had come in time with the smaller sum appointed by the scale, and so he would be entitled to his certificate for this court on paying, in addition to the 8*l.*, the third part of the 2*l.* required by the rule to be paid for the three courts.

The difference is a small matter, and I merely throw it out for consideration, because no doubt the desire of the Society is to be exact in making the charge.

Taking the view which we do of the Society's rule, we cannot grant the rule moved for.

Rule refused.

JAMES FALLIS V. CLAUS AND KERBY.

Trespass—Special Plea.

Trespass, *de bonis asportatis*.—*Plea*—Justification that the goods were the goods of one J. F., against which the defendant K. had sued out an execution: that J. F. fraudulently put them into the possession of the plaintiff, and that, while there, the defendant C., as bailiff, and K., by his command, seized them.

Held, that this was properly a special plea; and not an argumentative denial that the goods belonged to the plaintiff.

The plaintiff in this action complained of the defendants for taking his goods. The defendants pleaded that the goods belonged to one John Fallis, against whose goods the defendant Kerby had sued out an execution: that John Fallis fraudulently put the goods into the possession of the plaintiff, under cover of a conveyance fraudulently made, to defeat Kerby and other creditors, contrary to the statute: that the goods being in possession of the plaintiff under that fraudulent conveyance, Claus, as a bailiff, and the other defendant, Kerby, by his command, seized the goods, which is the trespass complained of.

Demurrer, because the plea amounts to the general issue, or to an argumentative traverse that the goods mentioned were the goods of the plaintiff: and because it gives no color of title to the plaintiff, &c.

J. Duggan, for the demurrer, cited *Harrison v. Dixon*, 12 M. & W. 142; 1 D. & L. 450 S. C.; *Switzer v. Ballinger*, 1 U. C. C. P., 338.

Burton, contra, cited *Ashby v. Minnitt et al.*, 8 A. & E. 121; *Tyson v. Little*, 8 U. C. R. 434; *Lee v. Rapelje*, 2 U. C. R. 368.

ROBINSON, C. J.—This plea is demurred to on the ground that it is only an argumentative denial that the goods belonged to the plaintiff, and on other grounds, none of which appear to us tenable.

For the reasons given in *Lee v. Rapelje*, 2 U. C. R. 368, we think the plea in this case was properly a special plea, setting out the bailiff's authority for taking the goods out of the plaintiff's possession, against whom he held no execution, but against another party. The plaintiff being in possession had *prima facie* the right of property, and his title could only be disputed on the ground of *mala fides*, by persons having an interest in the question, either on their own account, or as being authorized to act on behalf of others. Possession is sufficient proof of property against a defendant, standing for all that appears in the situation of a wrong-doer; and therefore, on a plea merely denying that the goods were the goods of the plaintiff, it was necessary for the defendants, if they desired to impeach a conveyance that had in fact been made, and the possession that had been given under it, to shew their right to call it in question.

Then the plea here avers, that the goods being the property of the debtor, he fraudulently assigned them to the plaintiff, who took them into his possession: and that the plaintiff having no other claim to them, the defendants seized them under the writ. That shews what the real point to be tried is, and gives implied color, by confessing possession and property in the plaintiff against all but persons coming with proper legal authority.

The plea does aver that the goods were *in fact* the goods of John Fallis, and those were the goods the defendant

seized in possession of James Fallis, the plaintiff. There is not that repugnancy here which was the ground of the judgment in *Harrison v. Dixon*, 12 M. & W. 142; for the plea in that case omitted altogether to state that the goods seized as the goods of the debtor were the same goods that were mentioned in the declaration, and was therefore most clearly a bad plea on that ground.

Judgment for the defendants on demurrer.

CUNNINGHAM V. DUANE.

Assumpsit for rent. *Plea*—that after the demise the estate became vested in the principal officers of H. M. ordnance, by virtue of the statute 7 Vic. ch. 11, and thereupon the estate of the plaintiff ceased, and was determined; that the said principal officers gave the defendant notice of this change in the title, and not to pay over the rent to the plaintiff; and that the defendant is now liable to them for the use and occupation of the premises.

Held, not double, or bad as amounting to the general issue.

Held also, that it was not necessary to negative in the plea any promise from the said principal officers to the plaintiff of a lease or conveyance of the premises, even if the statute required them to grant it, for that such an interest should have been replied by the plaintiff.

The first count averred a lease of certain premises by the plaintiff to the defendant on the 15th December, 1839, and from thence for one year, and from year to year, for so long a time as the plaintiff and defendant should respectively please, reserving a yearly rent of one shilling to be paid to the plaintiff at the expiring of each year, and one half of the produce of the premises demised, to be delivered to the plaintiff after the same was duly harvested;—and charged, that neither the rent had been paid nor the produce delivered for six years, viz., from 1845 to 1850 inclusive.

Plea: that after the said agreement and the said demise—to wit, on the 9th of December, 1843,—the said land and premises became and were vested in the principal officers of her Majesty's ordnance in Great Britain; and the said principal officers of her Majesty's ordnance in Great Britain then became seized in fee of the same, under and by virtue of a certain act of this province passed in the seventh year of our Sovereign Lady Queen Victoria, ch. 11, intituled, &c.; and by virtue of the said recited act the estate of the said plaintiff of, in, and to the said land and premises, "ceased and was determined;" and that the said

principal officers “ afterwards—to wit, on the 1st December, 1844—gave the said defendant notice of such their estate,” &c., and required him not to pay the said rent, nor to deliver the said one-half of the produce to the plaintiff, for the several years in the first count mentioned ; and that the defendant is now liable to the said principal officers, &c., for the use and occupation of the said premises.

Demurrer—Assigning for causes that the estate of the said principal officers is not sufficiently shewn ; that it does not appear that the plaintiff had not at the time of the passing of the said statute *a promise of a lease or conveyance* of the said premises, which the said principal officers were bound by the said statute to grant to the plaintiff.

That the said plea is double, in this, that it attempts to set up a title in the said principal officers, and also a liability on the part of the defendant to pay the rent to another party than the plaintiff : that it amounts to the general issue ; and that it does not answer the whole of the said first count, the notice of the title of the said principal officers being therein alleged to have been given to the defendant on the 1st of December, 1844.

Dalton, for demurrer. *Lyons*, contra.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this plea is a good answer to the action. It is clearly not double, and does not amount to the general issue, for it admits a promise made in 1839, but relies on the rent, in consequence of a statute afterwards passed, being of right payable to the Board of Ordnance—(if any term can be recognized as subsisting.) It sets up a defence which is not uncommon—that the lessor’s interest in the demised premises has ceased. We know judicially what is meant by estates vesting in the officers of the ordnance under the statute ; and they might under the act, be vested as estates in fee, or for any less interest, according as the estate in question was held before the passing of the act for the purposes mentioned in it. The plea asserts that this estate in 1843 became vested in fee in the ordnance ; and it asserts (what must be conclusive against the plaintiff’s right to sue, as landlord, for the rent

accruing from 1844 downwards) that on 9th December, 1843, the plaintiff's estate in the premises ceased and determined.

Notice of this change in the title need not have been averred. We are all of opinion that if the plaintiff before the passing of the act held any lease or conveyance, or promise of lease or conveyance, of the nature spoken of in the fourth clause of the act; such fact, if it could affect the right of the plaintiff to sue for the rent claimed, should have been shewn by the plaintiff by way of answer to the plea; and that the existence of any such interest was not necessary to be negatived in the plea. But at any rate the fourth clause is nothing more than a direction to the ordnance to confirm any such interest or promise; it has not the effect of itself of preventing the estate vesting in the ordnance, and continuing in them.

The plea should, perhaps, have shewn that this was land which, by reason of the purpose to which it was holden, came within the operation of the vesting act; but the averment that it did become actually vested in the ordnance, under the act, implies that with certainty; and it is not one of the causes of demurrer assigned that it is not expressly alleged. The first exception may have been intended to point at this supposed defect, but it does not do so intelligibly.

Judgment for the defendant on demurrer.

DOE. DEM. PETIT V. RYERSON.

The proviso in the 17th section of 4 W. IV., ch. 1, will prevent the operation of that statute against any person entitled to land as the grantee of the crown who has not exercised acts of ownership, or had knowledge of any person being in possession;—even though it should appear that he was unconscious of his title, and believed that he had disposed of the land.

Ejectment for the south half of lot 22, in 3rd concession of Townsend.

The defendant made title under a deed made to him by one Abraham Westbrooke on 12th November, 1845, in consideration of 500*l*. This was registered on 3rd May, 1850. The bargainor, Westbrooke, was shewn to be the

heir-at-law of Haggai Wesbrooke, and there was produced and proved upon the trial a deed poll, by which one Jabez Ellison, on the 18th December, 1806, granted, bargained, and sold the whole lot 22 to Haggai Wesbrooke, for a consideration of 65*l.*, stated to be paid. This deed was witnessed by two witnesses, and was registered on the 18th February, 1822. It began thus, "Know all men by these presents, that I, Jabez Ellison, &c.," and the words, "that I, Jabez Ellison," were written on an erasure, except the latter part of the name Ellison; though in all other places in the deed the grantor's name was written fairly.

No deed to Jabez Ellison was produced upon the trial, and there was none recorded in the register's office of the county; but it was proved, that, in August, 1825, one Olmstead, having bought the south half of the lot from Abraham Wesbrooke, went into possession, and cleared part and built a house on it, in which he lived some years: that he sold to one Slack, who went immediately into possession and always continued in possession, until he sold to the defendant Ryerson. It had been constantly occupied under the title derived from Ellison since August, 1829. Slack cleared twenty or thirty acres on it soon after he purchased. The taxes had been always paid by Westbrooke till he sold to Olmstead, and afterwards by Slack and this defendant, in succession. There were sixty acres cleared on the lot, with a house, a good barn, and out-buildings. It had been wild and unoccupied till sold by Wesbrooke to Olmstead in 1825, but since that time constantly occupied and cultivated. Olmstead and Slack not having registered their deeds, Wesbrooke, at the request of the parties, took up his deed to Olmstead, and made the conveyance directly to Ryerson, as it is often done in this country, to save expense.

The plaintiff proved, that on the 8th October, 1803, the whole of lot 22, together with lot 3, in the 9th concession of the same township, (Townsend,) was granted by letters patent to John Pettit: that lot 3, in the 9th concession was sold by Pettit to one Culver, in 1804, for 125*l.*, and had been constantly occupied for about forty years: that about three

years ago the defendant, finding his chain of title imperfect on the registry, and having nothing to shew title in Ellison at the time he made his deed to Haggai Wesbrooke, was desirous of having the omission supplied: that he found the lot 22 had originally been granted by the crown to John Pettit, the lessor of the plaintiff, and as he was still living in the township of Grimsby, in this province, he went to him, and acquainted him with the difficulty, and asked him whether he would have any objection to give him a deed to confirm his title: that Pettit at first expressed a willingness to do so, if he had owned the land, but said that all the land he had ever owned in Townsend he had long ago sold to one Culver, and that he was not aware that he had any claim to the land spoken of by the defendant: that afterwards, the lessor of the plaintiff told his son of the request that had been made to him by the defendant; and it seemed that on the son's finding among his father's papers a patent granting this lot 22, as well as the other lot which had been sold to Culver in 1804, it was determined by Pettit, on further consideration, and consultation with his son, that he would not give any deed to the defendant: and it ended in Pettit's refusing to do so, and in his giving instead a writing to his son, assuring the land to him, if he, the father should succeed in dispossessing the defendant of it.

This ejectment was brought for that purpose: the son, who was examined as a witness upon the trial, being the active person in carrying on the suit.

It was proved, that the father, who was about ninety at the time of the trial in April last, (and who has since died,) was in full possession of his intellect: that he was a man independent in his circumstances, and of respectable character, capable in business, and a magistrate: that he had not been a person who had speculated largely in lands: that he had always been resident on his farm in Grimsby, since he got his patent: and the patent had always been in his possession.

His place of residence was about forty or fifty miles from the land in question. It was not shewn that he had ever visited

that part of the country; or had any knowledge how the land in question had been occupied; or had done any act in regard to it as owner, except that the defendant produced evidence to shew that he had at some time before 1806 made a deed of it to Jabez Ellison.

The learned Chief Justice of the Queen's Bench (before whom the cause was tried) directed the jury that the evidence given was not sufficient to dispense with proof of the actual execution of the alleged deed from Pettit, or to warrant a verdict for the defendant on that ground.

And as to the long possession held by the defendant, and those through whom he claimed, he told the jury that that would clearly have barred the plaintiff, if it were not for the proviso in the 17th section of our statute 4 W. IV., ch, 1; but that it appeared to him that the case came within that proviso, for it was not shewn that the plaintiff had ever taken possession of the lot in any manner, or was ever conscious of any possession held, or improvement made by others.

The jury, adopting the ruling of the Chief Justice respecting there being no legal proof of any conveyance by Pettit, still found for the defendant, on the ground, as they stated, of his long possession, or of Pettit's dispossession for more than twenty years.

Freeman, for the lessor of the plaintiff, obtained a rule nisi for a new trial, on account of the reception of improper evidence, for misdirection, and because the verdict was against law and evidence.

McMichael shewed cause, and cited *Tyrwhitt v. Wynne et al.*, 2 B. & Ald., 554.

Freeman, contra, cited *Doe dem. Pettit v. Renard*, 6 U. C. R., 501.

ROBINSON, C. J., delivered the judgment of the court.

This is rather a singular case in its circumstances. Under the English Statute of Limitations, and on a similar state of things arising in England, unquestionably the lessor of the plaintiff would have lost his estate, and in such a case I think not unjustly; for if he was really for twenty-five years not merely inattentive to his right of

property, but unconscious that the land belonged to him, and so suffered other parties to hold all the time what they might well assume to be a rightful title, (although a link in the writings seemed wanting, which long lapse of time might well account for), and if he suffered them, though unconsciously, to make large improvements on the land, and cultivate it for nearly a generation, while he was living in the same province, and setting up no claim: if these were the facts, as they clearly seem to have been, it would be more just that their title should be confirmed, than that he should be put in possession at this late day, not only of the land which he had no idea he ever owned but of all the improvements made upon it by other parties, holding, as they supposed, under a legal title, paying value for the land as purchasers, and never imagining that they were acting as trespassers. What protects the plaintiff against being barred by the Statute of Limitations here as he would be in England, is the proviso in the end of the 17th clause of our Real Property Act, 4 Wm. IV. ch. 1, which enacts, "That until the person deriving title to land "in this province as the grantee of the crown, or his heirs "or assigns, or some or one of them, by themselves, their "servants or agents, shall have taken actual possession of "the land granted, by residing thereupon, or by cultivating "some portion thereof, the lapse of twenty years shall not "bar the right of such grantee, or any person claiming by, "under, or through him, to bring an action for the recovery "of such lands, unless it can be shewn that such grantee, "or person claiming by, under, or through him, *while en-* "titled to the land, had knowledge of the same being in the "actual possession of some other person not claiming to "hold by, from, or under the grantee of the crown, (such "possession having been taken while the said lot was in "a state of nature,) in which case, the right to bring such "action shall be deemed to have accrued from the time "that such knowledge was obtained."

This provision, which will in general operate justly in cases of mere trespassers, pretending no right, occupying wild lands without knowledge of the owners, has a hard

operation in a case like the present—where, in the first place, the parties who have been all the time occupying were *bona fide* purchasers, holding under deeds which they supposed gave them a good title, and where the patentee did not by himself, his servants or agents, take possession of the land, because he tells us himself he was not aware he owned it. He was not, like other owners of wild land, reposing on the goodness of his title, assuming that no one would take possession of it wrongfully, and therefore not putting himself to the trouble (which the statute excuses him from) of exploring the wilderness to see whether it has continued unoccupied. But he has refrained from inquiry, and from any attention to his property, because, as he tells us, he believed that he had sold whatever land he had owned in that township.

It is obvious, from the evidence, that if any one had happened to inform him, before the twenty-five years were run out, that some one was living on this lot 22, he would have taken no interest in the information, and would have done nothing upon it; for he had no idea that he continued to have any right to any lands in that township. In spirit and intention, therefore, the proviso which I have referred to is not applicable to such a case.

If, instead of the words in the statute, “unless it can be shewn that such grantee *while entitled* to the land had knowledge of the same being in the actual possession of some other person,” we could read, “unless it can be shewn that such grantee *while claiming title* to the land had knowledge, &c.,” then the proviso would clearly not take in such a case as the present; and I apprehend the legislature, if they could have foreseen the probability of such a case occurring, would have thought it right so to express themselves. It did not, however, appear to me at the trial that I could so understand and apply the statute as it stands; and I do not now think that we can take that liberty with it, though I confess I do feel a good deal pressed with the difficulty of allowing the operation of the statute to be precluded by this proviso, under such circumstances. I understand my brothers to have perhaps

less doubt than I have expressed, upon the application of the proviso to this case; and there certainly is nothing in the circumstance of the same patent embracing another lot (3, in the 9th concession) in the same township, of which possession was taken forty years ago by his vendee, as he may be presumed to have known.

We think, therefore, that in finding their verdict for the defendant, in consequence of the twenty-five years' possession held against the plaintiff, notwithstanding the 17th clause to which I have referred, the jury found against law, as they certainly did find contrary to the opinion which I gave on that point. But I am not wholly free from doubt on this new question.

The jury expressly disclaimed giving their verdict on the ground of a deed being proved to their satisfaction to have been made by Pettit to Ellison, and therefore it seems to us to follow that we must look on the verdict as being against law, and in a question of property, being founded on the Statute of Limitations, but in disregard of the provision which in words certainly extends to the case; and that there must, therefore, be a new trial, with costs to abide the verdict.

The Chief Justice here stated, and remarked upon the evidence at length, but no report is thought necessary of this part of the judgment; as upon the new trial some additional evidence was given of the fact of a conveyance having been executed by Pettit to Ellison, which the jury gave credit to, and found their verdict again for the defendant, which was not afterwards moved against.

Rule absolute for new trial, costs to abide the event.

CASSWELL ET AL. v. CATTON ET AL.

Debt on a replevin bond against J. C. principal, and C. P. and R. H. sureties.
4th plea. That J. C. commenced his suit without any delay, and prosecuted the same (not adding without delay).

5th plea. That J. C. commenced a suit without delay, and, from thence hitherto hath prosecuted the said suit without delay."

Demurrer to each plea as evasive, and no answer to the breach assigned.

Held—4th plea bad.

5th plea good.

Debt on a replevin bond, with the usual condition, by the assignees of the sheriff—assigning as a breach that the suit was not prosecuted with effect, and without delay, against the now plaintiffs.

The bond was set out on oyer.

4th plea.—That the defendant Catton commenced an action of replevin without any delay, and “from thence hitherto has continued and prosecuted his said suit, as in the said condition is mentioned.

5th plea.—That Catton commenced a suit without delay, and “from thence hitherto hath *prosecuted* the said suit without delay.”

Special demurrers to each of these pleas, assigning for causes,—

That they do not answer the breach alleged, *and* that they are evasive.

J. Wilson, for the demurrer, cited *Harrison et al. v. Wardle et al.*, 5 B. & Ad. 146; *Axford v. Perret*, 4 Bing. 586; *Morgan v. Griffith*, 7 Mod. 380; *Rider v. Edwards*, 3 M. & Gr. 202; *Gent v. Cutts*, 12 Jur. 113; *Turner v. Turner*, 4 Moore, 606.

D. G. Miller, contra, cited *Brackenbury et al. v. Pell et al.*, 12 East. 585.

ROBINSON, C. J., delivered the judgment of the court.

The fourth plea does not shew a performance of the condition, for it does not aver that the suit was *prosecuted without delay*.

The fifth plea is not subject to the same objection, and is, we think, sufficient. The case cited by Mr. Miller, in 12 East. 585, is in point; and no case cited on the other side interferes with that decision.

Judgment for plaintiff on demurrer to the fourth plea, and for defendant on demurrer to the fifth plea.

ROSS QUI TAM V. MEYERS.

32 Hen. VIII., ch. 9.—*Qui tam action for buying disputed titles.*

A testator died, leaving a will, by which he directed "that his debts should be paid as soon as practicable after his decease, and gave and bequeathed to his executrix and executors all his real and personal property in trust, to sell &c., such parcels or tracts of land as might be necessary for carrying his intention into effect. He then gave the residue of his real and personal property to his wife during her life, and after her death to such of his children as might then be living—share and share alike.

About twenty years after his death his widow, (who had married again), and one C. W.—for three of the children then living,—conveyed one of the lots now in question to one G. R. in fee; and G. R. subsequently conveyed to one P. L. who was in possession when the now defendant took his deed.

About the same time the widow and one of the sons conveyed the other lot now in question to the now plaintiff, who was in possession when the now defendant took his deed for this lot.

About sixteen years after these deeds were made the defendant took a deed of bargain and sale of both lots from all the surviving children.

Held, that there was nothing to prevent the children from conveying their reversionary interest: and that the defendant was not liable in a *qui tam* action for purchasing disputed title under 32 Hy. VIII., ch. 9.

This was an action brought 30th, July 1846, to recover a penalty on the stat. 32 Hy. VIII., ch. 9, for buying a pretended title.

The plaintiff declared in the 1st count that Angus A. Chisholm, James Chisholm, Duncan McDonell, and Mary McDonell his wife, pretending right in and to certain messuages, closes, lands, tenements, and hereditaments, with the appurtenances, situate in the township of Huntingdon, being lots 1 in 2nd, and 7 in 1st concession, &c., and not regarding the statute, &c., on the 3rd March, 1846, at, &c., did unlawfully, and contrary to the statute, bargain and sell to the defendant the said pretended right of them the said A. C., &c., in and to the said messuages, closes, lands, tenements, and hereditaments, with the appurtenances: whereas in fact neither the said A. C., J. C., &c., nor any nor either of them, nor any of their ancestors, nor any other person; by whom they, or either of them, claimed the said premises, *had been in possession of the same*, or of the reversion or remainder thereof; nor taken the rents and profits by the space of one year next before the aforesaid bargain made: and whereas in fact the right of the said A. C., J. C., &c., and of each of them in and to the said messuages, &c., at the time of the said bargain made, was a pretended right against the aforesaid statute. And the defendant at the time of the bargain well knew that the

said right of the said A. C., J. C., &c., in and to the said messuages, &c., was a pretended right; and also then well knew that neither the said A. C., J. C., &c., nor either of them, nor any or either of their ancestors, nor any person by whom they or either of them claimed the said premises, had been in possession of the same, *or of the reversion or remainder thereof*, nor taken the rents or profits thereof by the space of one whole year next before the bargain made, Yet that the defendant, so knowing the said right of the said A. C., and J. C., &c., to be a pretended right as aforesaid; and that neither—(asserting his knowledge that neither they nor any by whom they claim had been in possession, &c., as just above named)—but not regarding the statute, did then and there—to wit, on, &c., at, &c., contrary to the said statute, buy and take of the said A. C., J. C., &c., the said pretended right of them the said A. C., J. C., &c., in and to the said messuages, &c., so bargained and sold to him the defendant as aforesaid; the said messuages, lands &c., at the time of the buying such pretended right, &c. being of large value—to wit, 1800*l.* by reason whereof an action has accrued, &c., to demand of the defendant the said value of the said messuages, lands, and tenements, &c., so by the defendant bought and taken, &c.

In the second count the plaintiff charged that the defendant did unlawfully, and contrary to the statute, by means of a certain indenture of bargain and sale, then made by the said A. C., J. C., &c., to the defendant, obtain and get the right of the said A. C., J. C., &c., to certain other messuages, lands, tenements, and hereditaments, situate in the township of Huntingdon, being, &c., the said right of the said A. C., J. C., &c., to the last mentioned lands, tenements, and hereditaments *then* being a pretended right. There were precisely the same averments as to no one by whom A. C., J. C., &c., claimed having been in possession of the lands, or of the *reversion* or remainder thereof, for a year next before the said pretended right was obtained; and of the defendant's knowledge of the right being pretended; and that no one claiming, &c., had been in possession of the lands, or of the reversion or remainder

thereof, for a year next before, &c. ; and as to the *value of the premises so by the defendant obtained and got*, and the liability of the defendant to the penalty.

In a third count the plaintiff charged that the *defendant*, by means of *a certain deed* in writing, made by the said A. C., J. C., &c., did obtain and get the right of the said A. C., J. C., &c., to certain closes, pieces or parcels of land and premises, situate in Huntingdon, being, &c. ; the said right being a pretended right ; and neither of them, the said A. C., J. C., &c., nor any person through whom they claim, having been in possession of the same, nor of the reversion nor remainder thereof, for a year next before, &c. ; and contained the same averments as the other counts.

The defendant pleaded *nil debet*, and the jury found for defendant.

It was proved that one Alexander Chisholm, being seized of the lands mentioned in the declaration, made his will on the 15th October, 1808, by which he directed—"that his debts should be paid as soon as practicable after his decease, and gave and bequeathed to his executrix and executors all his real and personal property in trust to sell, alien, and convey, such parcels or tracts of land as might be necessary for carrying his direction into effect."

The residue of his real and personal property "he gave to his wife, Anne Chisholm, during her life ; and after her decease to such of his children as might be then living—to be divided share and share alike." And he appointed his wife executrix, and his brother John Chisholm, and Donald McDonell, Esq., executors of his will. It was admitted that the two last executors named died before 1816.

On 6th July, 1830, Anne Marsh, the widow of the testator, and who had since his death married one Marsh ; and Charles Werden, for Angus A. Chisholm, Charles Chisholm, and James Chisholm, in consideration of 80*l.* conveyed to Gilbert Reid, in fee, lot 1, in 2nd concession, Huntingdon ; and on 28th July, 1832, Reid conveyed the same land by bargain and sale to Philip Luke for 150*l.*

On 12th March, 1830, Anne Marsh and Charles Chisholm conveyed to the plaintiff Ross by bargain and sale, lot 7,

in 1st concession, Huntingdon. Ross entered on his lot, and had ever since been in possession.

Charles Chisholm, one of the sons of the testator, died about the end of 1845.

On 3rd March 1846, this defendant took a deed of bargain and sale in fee of both lots from *Angus A. Chisholm*, James Chisholm, Duncan McDonell, and Mary his wife, formerly Mary Chisholm, being the three surviving children of Alexander Chisholm, the testator.

There was proof that Luke was in possession of the one lot and Ross of the other, at the time the defendant took this deed, and that the defendant knew it. The lands were sworn to be then worth from 1800*l.* to 2000*l.*

The defendant's counsel moved for a nonsuit on the ground that the declaration was not supported; for that it was not shewn that Mary McDonell had conveyed to any person before the deed to the defendant, in which she joined.

The learned judge ruled, that even if the defendant were aware of the parties being in possession under deeds from Mrs. Marsh, who had a life estate, and from the sons of the testator, yet, if Mary McDonell had an equal interest in the land with her brothers (which she had not before conveyed,) the defendant had a right to purchase that undivided interest in the whole premises, and cannot be charged with buying a pretended right.

The plaintiff, declining to accept a nonsuit, a verdict was directed for the defendant.

Vankougnet, Q. C., shewed cause against a rule nisi for a new trial on the law and evidence, and for misdirection. He referred to the will, and contended that the sale to Ross was clearly not made by Anne Marsh as trustee. The purposes of the trust were satisfied, and she then held under the devise to her for life. Now, though some of the children appear to have sold by the same deed to Ross, yet one of them, the daughter (who joined in the conveyance to defendant,) did not, therefore the declaration is not supported: and the defendant had a right to buy her reversionary interest. Mr. Chisholm did not take an estate in fee, but only that quantity of interest which the purposes of

the trust might require.—Jarman on Wills, vol. 2, ch. 34, Estates of Trustees, p. p. 206, 213; Doe Cadogan v. Ewart, (a); Hawker v. Hawker, (b); Doe Shelley v. Edlin, (c); Doe White v. Simpson, et al., (d.)

Eccles, contra, referred to Sug. V. & P., vol. 2, 10th ed, p. 30; 2 Story Eq., sec. 1127; Jenkins v. Hilvy, (a); Balfour v. Welland, (b); Jeffreson v. Morton et al. (c); Houston et al. v. Hughes et al. (d). If the testator's widow had a right, as trustee, to convey a fee simple, and did so, the remainder limited to the children was destroyed. Then defendant, knowing these circumstances, takes a deed from the three surviving children (two of whom had already conveyed) of their reversionary interest. He is therefore liable in this action under the statute.

ROBINSON, C. J., delivered the judgment of the court. Without entering into the question whether Anne Marsh took necessarily an estate in fee under the will, or only an estate in in fee in case it should become necessary to sell for paying debts, or whether she was limited to an estate for life, I am clear that the verdict for the defendant was proper; for Anne Marsh, at any rate, could make a deed which would conclude her and bind her interest during her life, whether there were debts to be paid or not; and the possession of her vendees while she lived was, in any view, not inconsistent with the title of the testator's children, who could have no estate in possession till after her death. There was nothing to disable them from selling their reversion. They could not be disseized, and were not disseized by the vendees of Anne Marsh entering, and were therefore not disabled from conveying their reversion.'

The intention of the statute 32 Hy. VIII., ch. 9, and the ground of the principle of the common law, which is said to be fully in accordance with it, was, that a person claiming a right which he knew to be disputed should not sell a mere law suit, but should first reduce his right to posses-

(a) 7 Ad. & Ell., 636.

(b) 3 B. & Al., 537.

(c) 4 Ad & Ell., 582.

(d) 5 East., 162.

(a) 6 Ves. jr., 646, note (a).

(b) 16 Vesey, jr., 151.

(c) 2 Saun., 11 (b)

(d) 6 B. & C., 421.

sion, and then sell. These reversioners could not do that for they had no present right to the possession.

The deeds made by Anne Marsh, in 1830, more than, twenty years after the testator's death, in 1808, could never be inferred to be for payment of debts; and from the circumstance of the children of the testator, or some of them at least, being made parties to those deeds, no one would suppose otherwise than that the parties were affecting to sell their beneficial interest under the will. But then, in one of the deeds of 1830 none of the children were in fact executing parties, and in the other only one of them was. There was nothing therefore to prevent the children, except as applies to one of them, Charles Chisholm, who did execute one of the deeds in 1830, from conveying their reversion to any one who would buy it. Charles Chisholm died in 1845, and this defendant took no conveyance from him, but only from the three others, who had made no other deed, so far as we see in the evidence: Mary Chisholm certainly had not.

The stat. 32 Hy. VIII., ch. 9, forbids any one to buy any pretended right or title (which may include reversionary interests when they are known to be in dispute), except the person who shall sell has been in possession of the same, *or of the reversion or remainder*, or taken the rents or profits for a year; and the buyer, if he knowingly offends against this act, is to forfeit the value of the lands. I have found it difficult, in considering this statute, to satisfy myself as to what is meant by being in possession for a year of the reversion or remainder; of course the words which follow—“*or taken the rents or profits thereof*”—cannot apply to the case of persons holding estates in reversion or remainder; and the estate in remainder of the children in this case had been theirs for more than a year, and as much in possession as such an estate can be. But then it is said that they had no such estate, because all went to the widow to pay debts. That does not appear, and it is evident this plaintiff and the other vendee did not think so when they took their deeds.

But surely whether a person is, or is not, to be subject to

the penalties of this statute, can never depend on the determination of a nice question upon the construction of a will.

In the case of *Doe dem. Major v. Reynolds (a)*, we had to consider the question of the application of the statute under circumstances somewhat like the present.

In our opinion this rule should be discharged.

Per Cur.—Rule discharged.

CLARKE V. PROUDFOOT ET AL.

Attachment—liability of contractors with an absconding debtor to his assignees of the contract before his departure.

The plaintiff contracted with the defendants to build for them a mill dam on certain terms—H. & P. were his sureties.—While carrying on the work he assigned to them the contract and all his interest in it: he afterwards absconded, and an attachment was issued against him. The assignees carried out the contract, and then sued in the plaintiff's name for the money due. After action brought this attachment was withdrawn, and the defendants released by the attaching creditors from any right of action they could have against them, if they should pay over the money that might be recovered in this action. Within six months another attachment was placed in the sheriff's hands, of which the defendants were duly notified.

Held (the above facts being stated for the opinion of the court), that the assignees were entitled to recover as well for the work done by the plaintiff before his departure, as for that executed by them since: and that the defendants' paying would not be liable to the creditors of the plaintiff.

Assumpsit for money due on a special contract set out in the declaration, whereby it was agreed that the plaintiff should build a waste-weir and mill-dam for the defendants on certain terms and conditions specified.

Plea—non assumpsit, "by statute."

The following case was stated for the opinion of the court:

CASE.

"The action is brought to recover from the defendants under the special contract set out in the declaration. Clarke, the plaintiff, is an absconding debtor. In the month of November, 1850, he left the province, and on the 9th December following, an attachment against him as an absconding debtor was placed in the hands of the sheriff of the County of York, and public notice was duly given by the sheriff under the statute. There was no other attachment against him in the sheriff's office when the action was

begun, nor had there been any. Subsequently, and before this action was brought, notice of the said attachment was given to one John Maulson, as the agent of the defendants, by delivering to him a number of the *Gazette* containing it, and pointing out said notice there to him: the said Maulson then, and long previously and since, being the general agent of the defendants, and manager of the estate of Thorne & Parsons, of which the defendants are trustees and as such trustees engaged in the contract for the work now in dispute. No notice was given to any of the defendants personally by the sheriff.

“Before the plaintiff left the province, and while he was carrying on the works of the defendants under the contract set forth, he assigned the said contract to James Hall and Samuel Platt, and all benefit under it, as appears by the assignment, hereto annexed. The statute relied upon by the defendants is the 2nd William IV., chap. 5, the first absconding debtor's act. Since the action was begun, the attachment before spoken of, and which was the only one against the plaintiff in the sheriff's office up to the time of plea pleaded, has been withdrawn; and a release dated 9th June, 1851, under seal, executed by the defendants by the attaching creditors who issued that attachment, releasing them from any right of action they could possibly have against the defendants under the statute, if they should pay over the moneys that might be recovered in this action, Since plea pleaded, and within six months from the first attachment and before the same was released, another attachment against Clarke as an absconding debtor has been placed in the hands of the same sheriff, and public notice thereof given as required by the statute; and due notice therefore has also been given, to the defendants by the sheriff.

“The defendants contend that under the said statute they are protected, and cannot be made liable in this action, inasmuch as Clarke the defendant is an absconding debtor, and they had received notice of an attachment against him from the sheriff before this action was brought; and therefore to pay over moneys now to him or any agent or assignee of his would be fraudulent, and would make them liable to

the attaching creditors or any attaching creditors, within six months from first attachment.

“The plaintiff on the other hand contends, that the attaching creditor having withdrawn his attachment, and abandoned proceedings upon it, he never can obtain judgment or execution against the absconding debtor upon it, and therefore never can be in a position to sue these defendants if they should pay over in this action. Besides that, they hold his release under seal.

“The defendants maintain that they would be equally liable to the other attaching creditor, having received notice of his attachment. The plaintiff alleges that they are not liable under the statute to any attaching creditor but him of whose attachment they had had legal notice before the action was brought.

“The question is, whether on all or any of the facts stated this action is defeated under the above mentioned statute, the action being brought by the assignees under the said assignment.”

Vankoughnet, Q. C., for the plaintiff, cited *Slattery v. Turney et al.*, 7 U. C. R., 578; *Leslie et al.*, assignees, &c., v. *Guthrie*, 1 Bing. N. C. 697, 1 Saund. 210.

Hagarty, Q. C., for the defendants.

ROBINSON, C. J., delivered the judgment of the court.

We think the defence set up cannot, under the facts shewn, be received as an answer to the action.

It appears that before Clarke absconded he made over his contract to Hall & Platt, his sureties, and who, it is admitted, took that method of saving themselves from liability by taking up the contract when he had failed, and was about to abandon it and leave the country. The instrument by which Clarke made over the contract to them is submitted to us as part of the case. It expressly assigns and transfers to Hall & Platt not merely the job which he had only in part performed, but also all moneys due or to become due thereon.

The defendants, though mentioned as parties with Clarke and Hall & Platt to this instrument, are not in fact executing parties; but we take it to be admitted that they

accepted Hall & Platt and allowed them to carry on the work instead of Clarke.

We cannot judicially know how much of the money sued for in Clarke's name on account of the contract of the defendants being with him, and not being in form of law assignable, has been earned by the labour of Hall & Platt, and how much by Clarke. We have no means of making a decision, nor do we think the law would attempt it in such a case; for whatever was due on the contract had been made over to Hall & Platt when he was not an absconding debtor, and when we cannot say he was not legally competent to transfer the debt to them *bona fide* and for a good consideration; and if any fraud were surmised, that would be a question which we could not enter into, but which must go before a jury. But it is by no means difficult to believe that Clarke may have found he was likely to make little or nothing by the job on the terms on which he took it, and may have been quite willing to escape from further loss himself and to save his sureties from liability by giving up the whole into their hands, allowing them to receive any balance on the work already done which he could otherwise have claimed, as the condition of their going through with the work for the sum which he had agreed to take. They may have been willing to take it on those terms, and only perhaps on those terms; and if so, and all was transacted in good faith, the creditors of Clarke could have no right afterwards to expect their debts to be paid either with the money (which, for all we know, may have been either much or little) which Clarke had for a good and honest consideration allowed them to receive, or the money which, after his departure, was earned by their labour.

We think we must look on this as the action of Hall & Platt, rather than Clarke.

The defendants, by paying Hall & Platt, will be discharged as to Clarke, though he is nominally the plaintiff; and discharged also as to Clarke's creditors, or rather free from any claim of theirs: for his leaving the province was a fact subsequent to the arrangement which gives Hall &

Platt a right to anything Clarke may have earned so far as he had gone with the contract.

The defendants were not in reality indebted to Clarke when he absconded, though in point of form they were; and we could not say, upon the facts before us, that a creditor of his suing these defendants under the 12th clause of the Absconding Debtors Act, could recover any particular amount as a debt due to him; still less, that all the money was due to Clarke which the defendants earned, in carrying out his contract, and which, whether or not they seem to be suing for in his name.

DELANY V. MOORE.

A constable of any town within the county in which a warrant of attachment is issued under 12 Vic. ch. 69, sec. 1, has authority to execute such warrant.

Appeal from the county court of the county of Prince Edward.

The defendant in this case, being sued in trespass in the county court of the county of Prince Edward for taking the plaintiff's goods, justified in a special plea, under a process of attachment from the division court of the second division of the county of Prince Edward, issued under our statute 12 Vic. ch. 69, sec. 1, at his instance, and in his suit, against the now plaintiff. He averred that this plaintiff after the judgment had been obtained against him, was, attempting to remove his goods to another county, and that he, this defendant, sued out a warrant of attachment under the statute, directed to "one Michael McMahon, a constable of the said county of Prince Edward; the said McMahon being styled in the said warrant a constable of the town of Pictou"—"the said town being within the county of Prince Edward."

And the defendant averred that McMahon, at the time of the delivery of the writ to him, was a constable of the county of Prince Edward.

The plaintiff replied to this special plea, that the said McMahon "was not at the said time when, &c., a consta-

ble of the county of Prince Edward, in manner and form," &c.

The defendant on the trial proved, by the clerk of the corporation of the town of Picton, that McMahon was, on the 17th July, 1850, appointed a constable for the town of Picton by the corporation, and was sworn in on the same day. It was in the same month, and after such appointment that he executed the warrant of attachment.

The plaintiff's counsel objected that McMahon was not a constable of the county of Prince Edward, and so was not competent to execute the attachment authorized by 12 Vic. ch. 69, sec. 1; because that act provides that the warrant shall be directed to "the bailiff of the division court within which the same was issued, *or to any constable of the district*," and McMahon was not a bailiff of the division court, and was not a constable of the *district* (as it then was) of Prince Edward but a constable of the town of Picton, in the district of Prince Edward.

The learned judge of the district court overruled the objection; and, the verdict being for the defendant, he afterwards refused to grant a rule nisi for a new trial on the same objection. The plaintiff appealed against his judgment refusing the rule.

Read, for the appeal, referred to 33 Geo. III., ch. 2, section 10. *Patterson*, contra.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the learned Judge decided properly, and that this appeal must be dismissed with costs.

It is true that by the 12 Vic. ch. 69, sec. 1, under which this attachment issued, it must be directed to a bailiff of the division court or *to any constable of the district*. We must suppose that the Legislature while passing that act, were aware of the legal nature and tenure of the office of a constable in Upper Canada, and of the manner of the appointment; and their enactment must be so construed and applied, if possible, as to be consistent with these, in order that the provision may be carried into effect, and not to be inoperative.

The 12 Vic. ch. 81, secs. 67, 71, 74, gives the power of

appointing constables for towns to the town councils, though not in such clear and precise terms as might have been used for that purpose; and such constables, when appointed, are the proper constables for executing process within such towns.

Counties have now come in the place of districts under the 12 Vic. ch. 78, but there are no such officers as constables for counties under that or any other statute; nor were there before that act any constables of districts, for the statute 33 Geo. III., ch. 2, sec. 10, upon which the appointment of constables still rests, except so far as provision is made for the office by the municipal act which I have referred to, enacts that the parties "shall appoint a sufficient number of persons in their discretion to serve the office of constable *in each and every parish, township, reputed township, or place.*"

No authority existed under that statute or now exists, for appointing constables for a district or county generally; and this being so, when the legislature by their act 12 Vic. ch. 69 provided that it shall be lawful for the justice to issue his warrant of attachment directed "*to any constable of the district,*" we must understand them only to mean to any constable of, or *within the district*, and not to any constable appointed to act *for* the whole district, for there is no such officer.

McMahon in this case, was a constable of the town of Picton, within the district or county of Prince Edward, and it was within the town of Picton that the goods were to be attached, and were attached.

We are of opinion that within the words of the plea, and the intention of the statute, he was a constable—not for the county of Prince Edward, (for that is not the question), but a constable—that is, one of the constables—of (or within) the county for which the justice making the warrant was competent to act.

Appeal dismissed with costs.

THE FARMERS' AND MECHANICS' BUILDING SOCIETY

V. WHITTEMORE.

Debt on bond—the condition, set out on oyer, was for the due performance by one A. B. T. of the office of secretary and treasurer of a certain society according to the rules of the said society. In answer to a plea of performance the plaintiff replied, assigning for breaches—1st, That it was a rule of the said society that the treasurer should have authority to receive all moneys for them, and that he should also deposit daily with the bank all such moneys as he should receive ;” yet that he had received for the society a large sum of money, and had not paid it over, but had converted to his own use. 2ndly, That the said A. B. T. fraudulently represented a certain person to be a shareholder, and so induced the society to grant him a loan, whereby the money was lost.

Held, on special demurrer, that both breaches were well assigned.

Debt on a bond given by the defendant as one of several joint and several obligors, conditioned that one A. B. Townley should “justly, faithfully, truly, and properly,” execute the office of secretary and treasurer to the Farmers’ and Mechanics’ Building Society, according to the rules of the said society.

The defendant, after setting out the bond on oyer, pleaded performance.

The plaintiffs replied, assigning for breaches :

1st—That at the time of the making of the said writing obligatory and the condition thereof it was, and ever since hath continued, and now is, one of the rules of the society, that the treasurer should have authority to receive all moneys for them, and give receipts ; and “that he should also deposit daily with the bank all such moneys as he should receive ;” yet that he had received a large sum of money for the said society and had not accounted for or paid the same, but had converted and disposed thereof to his own use, contrary to the condition of the bond.

2nd—That Townley falsely and fraudulently represented one J. T. to be a shareholder and member of the society, and thus induced the said society to grant him a loan, whereby the money so advanced was lost.

Other breaches were assigned, in effect the same as the last, a different person being named in each, for whom Townley had so procured a loan.

Demurrer to the replication, assigning for causes :

As to the first breach : that it shews no violation of the rule—that it avers, as a breach of the rule, that he did not

pay over the moneys received, thereby argumentatively setting up that it was his duty so to do ; and that such duty should have been directly alleged, to enable the defendant to put it in issue.

And as to the second and other breaches—that it may or may not have been the duty of the treasurer to make any representations as to persons to whom money was to be loaned ; or that the rules of the society may have been that loans were to be granted on the representations of other officers of the society, and not of the treasurer ; in which case, if the breach be true as alleged, the defendant would not be liable ; and that an immaterial issue is offered.

Crooks, for the demurrer, cited 1 Ch. Plg. sec. 611, 612 ; *Plomer et al. v. Ross*, 2 Taunt. 386 ; *Serra et al. v. Wright*, 6 Taunt. 45 ; *Gainsford v. Griffith*, 1 Saund. 58 ; 2 Saund. 181, n. 10 ; *Dartnall v. Howard et al.*, 4 B. & C. 345 ; *Webb v. James et al.*, 8 M. & W. 645.

J. Duggan, contra.

ROBINSON, C. J., deliverd the judgment of the court.

We consider the plaintiff's replication to the second plea good, so far as regards the first breach assigned in it ; for the rule mentioned there is only referred to as shewing that the money was to go, and did go, into Townley's hands to be deposited in the bank ; and that after it was thus in his charge, instead of accounting for it and paying it over, according to the rule, and his duty, he spent it.

As to all the other breaches, they appear to us to be quite well assigned and to be clearly breaches of the condition ; for they each state that Townley, being secretary and treasurer, falsely and fraudulently represented a certain person to be a shareholder in the company, when in fact he was not, as Townley well knew ; and the plaintiffs aver, that in consequence of this representation the plaintiffs lent to such person a sum of money, which otherwise they would not have lent him ; whereby such money, lent in reliance on Townley's statement, has become lost to the plaintiffs. Such false representation, knowingly made, would be a plain breach of the condition of the bond—that Townley, as secretary and treasurer, should at all times justly, faithfully, truly, and properly execute his office.

It is not explained in the replication how the deception necessarily led to the loss of the money in any of the cases ; but the statute shews that the system is based on loans being made to shareholders, though it would seem not illegal under the act to lend to others, when there were no rules to the contrary. But be this as it may, such a deception would be a breach of the condition which binds to faithful conduct, and the condition would be broken by it. The amount of damages, and how they accrued, would be matter of evidence at the trial.

Judgment for the plaintiffs on demurrer.

MICHAELMAS TERM, 15 VIC.

Present—THE HON. JOHN BEVERLY ROBINSON, C. J.

“ THE HON. WILLIAM DRAPER, J.

“ THE HON. ROBERT EASTON BURNS, J.

CLEMENT V. DONALDSON.

What constitutes a sealed instrument.

To an action of covenant on a deed the defendant pleaded “ non est factum.”

It appeared that he had signed the deed, and afterwards merely marked the paper with the end of a poker, opposite to his name, not even acknowledging the mark as his seal.

The court *held* this not sufficient to constitute a sealed instrument, and ordered a nonsuit to be entered.

The defendant was sued in covenant on an instrument by which he bound himself to the plaintiff to relieve certain property, which the plaintiff had lately purchased from a third party, from an incumbrance which the defendant had placed upon it when the title was in him. The plaintiff had given him value for his undertaking, but the defendant, nevertheless, failed in performing it ; and the land was in consequence taken possession of by a building society, to which the defendant had mortgaged it.

The defendant, among other defences, pleaded “ non est factum.” The alleged deed, when produced, had the signature of the defendant, which was not disputed, and was proved by the subscribing witness ; but it had

no seal, either of wax or a wafer, or anything placed on or attached to the paper to serve as a seal. It had a black mark opposite the name, looking much as if there had been a blot of ink there, which it had been attempted to scrape off with a knife.

The subscribing witness swore that he saw the defendant sign the paper, and heard him acknowledge it; that after he had signed it, the attorney who prepared it said there must be a seal to it, and took up a poker, and with the end of it marked the instrument as it appeared at the trial, saying that would do for a seal.

The defendant was present, and made no objection; neither did he, after the mark was made, acknowledge it as his seal.

It was objected that this could not be treated as a sealed instrument.

The learned judge reserved leave to move for a nonsuit, and in the meantime allowed a verdict to be taken for the plaintiff for 125*l*.

Galt, for the defendant, obtained a rule nisi for a nonsuit on the leave reserved, or for misdirection, and on the law and evidence; against which

Hagarty, Q. C., shewed cause, and cited the *Queen v. the Inhabitants of St. Paul, Covent Garden*, 7 Q. B. R. 232.

The only question was upon the due execution of the deed.

ROBINSON, C. J., delivered the judgment of the court.

So long as the law recognizes so many and such important distinctions between writings sealed and those not sealed, we cannot agree to anything so absurd as to admit that what was done in this case was equivalent to sealing.

The passage from Sugden on Powers, read by the court in the case of the *Queen v. the Inhabitants of St. Paul, Covent Garden*, is not easily to be reconciled with what is stated in all books of authority on the subject; and I am not willing to go so far as to hold, that if a person signs his name to a piece of paper, and then merely touches it with a stick (or with the end of his pen knife) and says that he

seals it, that it shall be taken to be sealed, though the paper bears no mark whatever of an impression either upon wax or on a wafer, or on any substance of any kind, and though nothing has been stamped or in any way impressed upon the paper. At least, I would desire better warrant for so holding than Mr. Sugden's *dictum* that he was *told* Lord Eldon so decided when in the Common Pleas.

The court of Common Pleas, in *Adams et ux. v. Kerr*, 1 B. & P. 360, did not seem to think that the want of a seal could be supplied by a much more respectable substitute.

The case relied on of the *Queen v. the Inhabitants of St. Paul, Covent Garden*, shews no more than that the court accepted as a seal an impression made on or sunk in the paper by a stamp, marked with an appropriate device, and evidently intended to constitute the seal to a class of public documents, executed for a public purpose.

In *Sprange v. Barnard et al.*, 2 Brown, C. C. 585, Lord Kenyon had decided that a stamp might be treated as a seal. But nothing that I have yet seen would warrant us in holding that the attorney who ought to have taken the trouble to make the instrument what it professed to be, could convert a simple contract into the speciality of another party, by taking up a poker and making a black mark upon it in the place where the seal ought to be. I should have less difficulty in concurring in the expediency of abolishing by law the distinction between sealed and unsealed instruments than to hold, while the law continues as it is, that a writing can derive the solemnity which the courts are bound to attach to a sealed instrument by the ridiculous attempt which was made to constitute this a deed.

This is a very different case from some that have arisen, where, on instruments executed a long time ago but which profess to have been sealed, the seal has worn off by time, or been destroyed by accident or design : shewing, perhaps, still some appearance of a seal having been affixed.

Here we are told precisely what was done, and we know that we see the instrument in the state that it was at the time. Here is no room for presumptions, which should be

always liberally entertained in support of justice ; and we cannot, on the evidence, hold this to be a sealed instrument without holding that land may be conveyed, or a power executed for the most important and special purpose, or a debt made a speciality debt, and so entitled to preference, and to be taken out of the Statute of Limitations, by merely touching the paper with a dirty stick, of which no distinct trace might remain an hour after.

Per Cur.—Rule absolute.

THE BOARD OF SCHOOL TRUSTEES OF THE TOWN OF BROCKVILLE v. THE TOWN COUNCIL OF BROCKVILLE.

The school trustees of towns, under 13 & 14 Vic. ch. 48. sec. 24. have unlimited discretion as to the number of schools to be kept up, and are not subjected to the restrictions in this respect imposed upon the school trustees for townships.

Where an estimate of the sum required for school purposes for a certain year was sent to the town council by the school trustees, and the council recognized such estimate by paying a portion of the amount, and submitted to the court their reasons for refusing to pay the balance.

Held, that they are precluded from objecting that the estimate was not laid before them *as by law required*.

Hagarty, Q. C., moved to quash the return to the mandamus issued in this case, the same being insufficient in law, and shewing no cause or answer to the writ, being also uncertain and inconsistent ; and that a peremptory writ should go, commanding the defendants to levy the money called for by the requisition of the school trustees of the 3rd February, 1851.

The writ was ordered on an affidavit of the secretary of the Board of School Trustees of Brockville, setting forth that on the 3rd February, 1851, an estimate of the amount required for school purposes for the year 1851, was prepared and adopted by the trustees, and notice thereof sent to the clerk of the town council ; that the annual value of taxable real and personal property in Brockville, as appears by the assessment rolls for 1851, and as certified by the clerk of the town council, is 16,552*l.* 2*s.* 1½*d.*; and that, by a resolution of the town council, passed on the 5th May, 1851, the amount to be levied for school purposes for 1851,

is 4*d.* in the pound on such taxable property, which would amount to less than 276*l.*, whereas the amount required by the estimate of the school trustees is 1,205*l.*

And to this affidavit sworn copies of proceedings of the town council were annexed, whereby it appeared that on the 3rd February, 1851, the board deliberated upon the requisition of the school trustees calling for 1,205*l.*, and resolved that 280*l.* should be granted—viz. for school masters' salaries, 200*l.*; rent of school houses, 40*l.*; superintendent's salary 15*l.*; apparatus, stationery, books, &c., 25*l.*; and that the residue be taken into consideration at a future period; that on the 18th March, 1851, the council resolved that a by-law should be framed appropriating 920*l.* for purchasing land and building a school house, in accordance with a statement furnished by the secretary of the school trustees; that on the 7th of April 1851 it was resolved by the council that the last above resolution be expunged; and at that meeting it was resolved that under the statute 13 & 14 Vic. ch. 48, it is the duty of school trustees, before altering the boundaries of any school section, or uniting two or more into one, to call a public meeting of the freeholders or householders of each of such sections, by notices to be posted in three public places specifying the object of the meeting; and that no step shall be taken towards the altering the boundaries of any school section, nor any application entertained for that purpose till all the parties interested have been duly notified of such intended application; and till an application be made by a majority of the freeholders or householders in each section, sanctioned by a public meeting to be so called.

The requisition for 1,205*l.* made by the school trustees specified the following items as composing the sum, viz:

Site of school house	£170
Building school house.....	750
Plans and specifications.....	5
School masters' salaries.....	200
Rent of school houses for 1851.....	40
Apparatus, stationery, books, &c.....	25
Superintendent's salary.....	15

£1,205

On these facts being shewn the court directed that a mandamus nisi should issue ; to which writ a return was made to the effect that the school trustees did not lay before the council, *as by law required*, a requisition or estimate for 1,205*l.* for school purposes for 1851 ; though nevertheless the trustees having in fact, though not according to law, required the 1,205*l.* from the council for school purposes for that year, the council did, before the receipt of this *writ*, provide and levy 280*l.* parcel of the 1,205*l.* (specifying the items which that sum was designed to meet) ; and that as to 925*l.*, the residue, they admitted that they had refused, and did still refuse to provide the same ; because they alleged that that sum was by the trustees required in their estimate for the purchase of a site and the erection thereon of a school house for the town of Brockville, in lieu and instead of the said four school houses which were then, and before, and at the time of the requisition, being used as school houses in the four school sections into which, at the time of the requisition, Brockville was duly divided for 1851 : that the trustees had themselves adopted and approved of such division, and had established a school in each section for 1851 ; and that in the same requisition in which they required the 925*l.* they required also 280*l.* for allowances of salaries, &c., for the said four schools : that the trustees, before making their requisition, resolved, and that they intend to do away with the four schools sections and school houses, and the schools therein, and to have instead but one school section, site, and school house for the town ; and that to purchase the site for, and obtain such school the 925*l.* was required, and for no other purpose : that such substitution of one school for the four, and the requisition for 925*l.* for that object, has always been and is contrary to the wishes and opinions of a majority of the freeholders and householders of the town ; and were not or was not approved of, ordered, voted, or desired, at or by any meeting of freeholders or householders of the town of Brockville, or of any of the said school sections, convened according to law by the said Board of School Trustees for that purpose.

Vankoughnet, Q. C., shewed cause. The authorities cited were, *Regina v. Kendall*, 12 B. R. 366; *Wright v. Fawcett*, 4 Burr, 2041; *Regina v. Tithe Commissioners of England and Wales*, 14 Jur. 290.

ROBINSON, C. J., delivered the judgment of the court.

We think the town council have been wrong in supposing that the fourth division of the 24th clause 13 & 14 Vic. ch. 68, is restrained or affected by the 18th clause (fourth division), for that the latter provision extends only to school trustees for townships. The discretion of school trustees for towns as to the number of schools to be kept up is unlimited under the 24th clause, whether it was so intended or not. We infer, however, from the act that it was intended, and there are obvious reasons for making the difference which the language of the act does make. The two descriptions of trustees are carefully kept distinct by the act.

Then the defendants now shew by their return that they have deliberately resolved not to carry out the estimate of the trustees in full, and it is therefore immaterial whether the estimate was first laid before them in due form or not; for they have recognized it, and have acted upon it in part, and have refused to proceed upon the other part, and have submitted to us their reasons for such refusal. These reasons, we are of opinion, are insufficient, and the return therefore will be quashed, and a peremptory mandamus must go to levy the 925*l*.

There is no inconsistency in the trustees having asked for the salaries for the year for the four schools which they intend shall give place to one large school; because they must be supposed to have meant to continue these schools till they should have the one large school ready which they intend to substitute for them, otherwise the business of instruction would be interrupted.

Peremptory mandamus awarded.

THE QUEEN V. LAFFERTY.

An indictment cannot be removed by *certiorari* from the Court of General Quarter Sessions to the Queen's Bench after the verdict, even by consent of the parties.

The defendant was tried at Hamilton, before the Court of General Quarter Sessions, upon an indictment for cutting ditches across a public highway.

Several objections were taken at the trial, all of which were over-ruled by the judge presiding. It was argued by the prosecutor's counsel that if the case could not be removed to the Queen's Bench, so that the defendant could obtain a new trial in case of any misdirection, a new trial might be moved for and granted in the Quarter Sessions, if it should be there considered that the ruling of the court had been erroneous. On this understanding the jury were directed to find for the crown.

The court at the trial intimated a wish that the case should be removed by *certiorari* to the Queen's Bench, on account of the legal questions raised; and judgment was not given, in order that a *certiorari* might be moved for.

In Hilary term a *certiorari* was prayed, which was granted in the following term, and upon the return.

D. B. Read, for the defendant, obtained a rule to shew cause why the verdict should not be set aside and a new trial had, or why the judgment should not be arrested.

Freeman shewed cause.

Read, contra, cited *Rex v. the Inhabitants of the County of Oxford*, 13 East. 411; *Rex v. the Inhabitants of Penne-goes and Town of Mackynlleth*, 1 B. & C. 142.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that, whatever may be the inclination of the parties concerned on both sides in the litigation about this road, we cannot properly grant what is applied for to any extent, and have no other course to follow than to remit the record to the Court of Quarter Sessions, to be further proceeded upon there as the law may require. The judgment of the court in the case of the *King v. the Inhabitants of the County of Oxford*, 13 E. R. 411, seems to be still unquestioned; and, though it may appear at first sight inconsistent with what we find stated in *Chitty's Criminal*

Law and other books on the same subject—namely, that indictments for misdemeanour are frequently removed by *certiorari* from courts of oyer and terminer, and from the Quarter Sessions, to the Queen's Bench, for the express purpose of being able to obtain a new trial, which the inferior courts cannot grant; yet what is there meant is a removal by *certiorari* before the trial in the court below, in order that the trial may take place in the Queen's Bench upon a nisi prius record from that court, where the defendant will have the advantage, if the law or facts be not correctly dealt with, to apply for a new trial, which of course would be of the same kind and by the same authority as the first. This record has been removed after verdict upon a trial in the inferior court, and before judgment, in order that this court may examine into the merits of the trial which has taken place in the Quarter Sessions. That we cannot do, without departing from all authority, and adopting, without legislative sanction, a course which we believe to have been never pursued by this court, and which we find opposed to the law and practice in England.

The record, besides, is not properly before us. There is no caption to the indictment, nor any record of the verdict. All that is done is, that the indictment itself is sent to us, with the verdict "guilty" endorsed upon it, without a word more. It seems clear that if the return were free from any exception or defect, we could neither award a new trial nor pass sentence on the conviction; and we cannot, because the parties are willing, take an unprecedented course in a criminal case (*a*).

Rule discharged.

THE QUEEN V. PATTON.

Costs recoverable on an extent.

Poundage is recoverable from the defendant upon a writ of extent. Other expenses attending the execution of the writ may also be recovered, on application to the court or a judge in chambers.

Hagarty, Q. C., on the part of the defendant, obtained a rule this term to shew cause why the master should not be

(a) See 1 Chitty's Criminal Law, 378, 381, 394.

ordered to revise the taxation made in this case, of certain costs demanded by the sheriff from the defendant.

The question submitted to the court was, whether upon an extent executed in this province poundage is recoverable from the defendant.

The defendant, as clerk of a division court in the district of Simcoe, on 15th April, 1847, made a bond to the Queen, under 4 & 5 Vic. ch. 3, with sureties, for the due performance of the duties of his office.

And this bond having been put in suit at the instance of certain parties, plaintiffs in the division court, whose moneys he had received and not accounted for, proceedings were taken by *sci. fa.*, and after defence a verdict was rendered at Nisi Prius for the Crown for 20*l.* 9*s.*

Judgment was entered on 15th November, 1849, and a writ of extent thereupon issued, and an inquisition was taken, and returned by the sheriff, setting forth lands and goods in the possession of the defendant.

The sheriff, it appeared, put a bailiff into possession to take care of the goods, and incurred expenses in consequence of the seizure, and before the debt was paid, which he desired to have allowed to him.

M. Vankoughnet shewed cause: he referred to 3 Geo. I., ch. 15, sec. 3, 9, 13; *Exparte Villers et al. in Rex v. Villers*, 11 Price, 575; *Rex v. Deane*; 2 Anstruther, 369.

Hagarty, Q. C., contra, referred to 2 Geo. IV., ch. 1; and cited *Corbett v. McKenzie*, 6 U. C. R. 605; *Graham et al. v. Grill*, 2 M. & S. 294.

ROBINSON, C. J., delivered the judgment of the court.

We see no reason why the statute 33 H. VIII., ch. 39, sec. 54, should not be held to be in force here; and that provides, that in all suits upon obligations or specialties made to the king, costs shall be recovered by the king from the defendant, as in ordinary cases between party and party.

Then, this being a case of that nature, it is clear that the poundage, which in other cases would be payable to the sheriff by the Crown out of the money levied, according to the direction in 3 Geo. I., ch. 15, sec. 3, may be included in the costs to be levied on the defendant under the extent.

West on Extents, ch. 23, states the law and practice to be such. We find nothing that would extend to the case of Crown debts in our provincial statutes or our tariff of fees; that is, no provision respecting poundage or other fees or expenses attending execution. There is no foundation afforded by them for any direction by us to the master, or for any allowance to be made by him as of right. Poundage, as we have already stated, may, we think, be levied under the sanction of 33 Hen. VIII., ch. 39, and the course which has been taken in England in consequence of the provisions of that act.

As to any expenses attending execution beyond poundage, they can only be obtained by an order of this court, or a judge such as might be made by a baron of the exchequer in England; and it seems that such expenses as it may be thought right to allow of that nature may be authorized to be levied upon the party in an action such as this is, on a bond made to the king—in a penalty—where the penalty is large enough to cover the costs in question. The case of *Rex v. Deane*, 2 Anstruther, 369, authorizes this, and appears to point out the course to be taken in this case—namely, that the sheriff shall apply to a judge in chambers for any allowance that he may believe himself entitled to in addition to poundage, supported by proper vouchers; and that whatever shall be so allowed (if anything) may in addition to the rate of poundage allowed by 3 Geo. 1., ch. 15, be levied on the defendant to the extent of the penalty.

Rule absolute for revision.

IN RE COYNE V. THE MUNICIPAL COUNCIL OF DUNWICH.

When a municipal council, on being served with a rule nisi, repealed the by-law complained of, they were still obliged to pay the costs of the application.

In this case *C. Jones* obtained a rule nisi last term to quash a certain by-law passed by the municipal council of Dunwich providing for and regulating the fees of township officers.

The rule was served on the town reeve on the 24th September, 1851; and on the 30th September the council

passed a by-law repealing the by law excepted to, and on the same day they served a notice on the applicant that they had done so.

On the return of the rule in this term,

Cooper, for the council, submitted that under these circumstances they should not be made to pay the costs of application.

ROBINSON, C. J.—The statute 14 & 15 Vic. ch. 109, sec. 35, provides that whenever any by-law shall be quashed, or declared illegal or void, the municipality shall pay all costs and expenses attending the quashing of it.

We have not literally quashed the by-law in this case, because, yielding to the application, the council at once, on notice of the rule, repealed it; but we have declared it to be illegal, and think we ought equally in that case to award to the applicant the costs to which he was put in obtaining the rule nisi, and serving it.

The statute where it applies leaves no discretion, but declares that costs shall follow.

Costs of the application to be paid by defendants.

IN RE HILL AND THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF WALSINGHAM.

The court refused a rule nisi to quash by-laws of a township council, on the ground that having passed a by-law to contract a loan, they had exceeded their powers in afterwards modifying the said laws; it appearing that such alterations could not affect the security of creditors.

Or, on the ground that the said laws were passed at a special meeting called by a member of the council, and not by the town reeve or other authorized officer.

And semble, with respect to the last objection—that it is doubtful whether the court has authority under 12 Vic. ch. 81, sec. 155, to quash a by-law for an irregularity in the manner of its being passed, though they might hold it void if relied upon in support of something done under it; and that if they should entertain a motion to quash any by-law on account of an irregularity in passing it, it would rather be under the principles of the common law.

Read moved to quash a by-law passed on the 30th September, 1851, by the Township council of Walsingham, for amending and repealing a by law passed on the 26th June, 1851, entitled "A by-law to authorize the Town Reeve of the Township of Walsingham to raise a certain sum of money by debentures,"—except such parts thereof as relate

to the rate of assessment, and the special purpose for which the meeting of the council held on the 30th September, 1851, was called; on the ground that in passing such parts of the by-law as do not relate to the object for which the meeting was called the council exceeded their powers; and because the repeal of the portions of the by-law of the 26th June, 1851, relating to the loan upon debenture, was contrary to the 177th and 178th clauses of 12 Vic. ch. 81.

And that a by-law passed on 3rd July, 1851, should also be quashed, having been passed at a special meeting called by a councillor, and not by the reeve, as the law requires.

ROBINSON, C. J.—We have examined these by-laws and do not find that there is anything in the provisions of the by-law of September 30th, 1851, opposed to the 12 Vic. ch. 81, or that we can determine to be illegal. The council have been careful to do nothing that could impair the security of any person who had purchased debentures issued under the former by-law; they sustain those fully; and we cannot doubt that they have power to modify the measure which they had passed, in regard to the method of issuing and disposing of debentures to be thereafter issued, and the accounting for the proceeds.

The motion seems to have been made under an erroneous impression in the applicant, that when once the council had determined to contract a loan, in order to aid in advancing a public work, or for any purpose, the whole matter of the by-law passed for that object must be entirely out of their control, and not merely such parts of it as are necessary for securing those who may have advanced money under its provisions.

But the 177th and 178th sections of 12 Vic. ch. 81 have not that effect; and it would be most imprudent in the legislature to have placed the councils under such restrictions, for then they would have no power to recall or alter anything that they might have done irregularly or unwisely but must let the first measure go into effect with all its imperfections, and the council would be unable to guard against the consequences of any fraud or mal-practice which they might have cause to apprehend.

The objection against the by-laws of July and September, that the one was passed by a meeting specially called by a member of the council, and not by the town reeve, or other authorized officer of the corporation, and that the other embraces objects different from those for which the special meeting was called at which it was passed, is one which we do not feel ourselves clearly at liberty to entertain, under the authority delegated to us by the 155th clause of 12 Vic. ch. 81, which seems to contemplate only the giving power to pronounce upon the legality or illegality of a by-law on a view of its contents.

Whether we ought not merely to hold a by-law void when brought before us in support of any act done under it, by reason of its having been in some measure irregularly passed; but also to entertain a motion on such a ground for setting it aside, is a question of much importance. If we should feel it incumbent upon us in any case so to interfere, it would not be, we apprehend, under the clause of the statute referred to, but on the general principle of the common law, that it is necessary to the validity of a by-law that the mode of passing it prescribed by its charter should be strictly pursued, and that in the absence of any express provision on the subject, it should appear to have been passed in such a manner as by the common law would be essential to its validity.

In looking over the papers placed before us in this case and on examining the statute, we see no sufficient ground for calling these by-laws in question.

Per Cur.—Rule refused.

BROWN AND McDONELL V. BROWNE.

Plaintiffs bought from defendant certain coal, shipped to defendant at Toronto from a foreign port, and then lying on board the vessel in the Welland Canal. A sale note was given stating only the quantity and price, and the time by which it was to be taken out of the vessel.

Held, that defendant was not obliged to pay the import duties.

Held also, that evidence was rightly admitted to shew the usage of the trade on sales made under such circumstances.

Assumpsit: to recover the import duties paid on certain coal, bought by the plaintiffs from defendant.

The coal was shipped at Cleveland for the defendant at Toronto, and was intended to be landed there, after passing through the Welland Canal.

According to the general usage of trade, where bulk is not broken, duties would not be paid before the arrival in Toronto.

Being late in the season the vessel was detained by ice, and while lying at the junction of the Chippawa River with the Welland Canal, the plaintiffs agreed with the defendant's agent for the purchase of the coal on board.

The sale note given by the defendant's agent stated merely the quantity and price, and at the foot the receipt of promissory notes for the price was acknowledged; and a memorandum added, "the above coal is now lying frozen in the Welland Canal, and Brown and McDonell are to have the coal all out of the vessel by the 1st of March."

The plaintiffs, when they desired to take out the coals, found that it was necessary to pay the import duties before they could get a permit to land them. They paid the duties, and brought this action in consequence, contending that from the nature of the transaction it was incumbent on the defendant to pay them.

The question was whether, from the sale, made as it was, such a contract resulted as was stated in the declaration—namely, that the coals were to be delivered free from all further charges than the price agreed upon per ton.

Evidence was admitted to shew that the usage of the trade in such cases is, that the purchaser pays the duties when he lands the goods.

The jury found for the defendant, it being the opinion of the learned judge that the contract as laid was not proved—viz., that the seller was to pay the duties.

Eccles, for the plaintiffs, obtained a rule nisi for a new trial on the law and evidence: for the reception of improper evidence; and for misdirection.

Hagarty, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the verdict was properly given for the defendant, and that there was no misdirection, nor any evidence improperly admitted.

The plaintiff did not shew such a contract as he set out in his declaration, but he endeavoured to engraft something on the contract, which he neither shewed to have been expressly agreed to, nor to be such as can be fairly deduced from what passed. The defendant sold the coal as it was; that is, on board of a vessel in the Welland Canal; and all that can be said is, that by law it would be subject to duty if the owner should land it in Canada, but free from duty if he should choose to take it through the canal to a foreign port.

There was no writing produced that expressed anything on the subject of duties, and the defendant was therefore not seeking to contradict the terms of any writing by parol testimony when he gave evidence as to what was the usual course of trade when purchases of coal are made under such circumstances.

That was strictly admissible evidence; because, when we know what the general usage of trade is in regard to any branch of business, we are to look on the parties as intending to contract with reference to it, unless we have proof that they meant to deviate from it.

Rule discharged.

BROWN ET AL. V. CARROLL.

Nul tiel record.

The declaration set out a writ of *ven. ex.* reciting that the sheriff had been commanded to make of lands and tenements, &c.: his return that he had taken lands and tenements, which remained unsold, &c.; and commanding that he should sell the said lands and tenements, &c.

Plea—*Nul tiel record*, and issue thereon.

The exemplification produced shewed a writ of *ven. ex.* reciting the sheriff's return that he had taken *goods and chattels*, &c., which said remained unsold, &c.; and commanding him to sell the *lands and tenements*.

The writ was truly set out in the exemplification.

Held, that no amendment could be allowed, the error being in a material part of the writ itself, and not in the declaration; and that the defendant was entitled to judgment.

Issue on plea of *nul tiel record*.

In the first and second counts the plaintiffs set out a writ "of our Lady the Queen, called a *venditioni exponas*, directed to the sheriff of the county of Oxford, in which said writ it was recited that the Queen had lately commanded the said sheriff that of the lands and tenements of John Brooks, in his county, he should cause to be made

the sum of 104*l.* 10*s.* 6*d.*, which the plaintiffs had recovered against him for their damages, &c.; and that he should have that money before the Queen, at Toronto, on the first day of Michaelmas term, 1849, to render to the plaintiffs for their damages aforesaid; and that the sheriff had returned, that by virtue of the said writ to him directed, he had taken *lands and tenements* of the said Brooks to the value of five shillings, which remained in his hands for want of buyers; and the plaintiffs averred that by the said writ of *venditioni exponas* the sheriff was commanded that he should sell, or cause to be sold, the said lands and tenements of the said John Brooks, by him taken, in form as in the said writ mentioned, and every part thereof, for the best price that could be obtained for the same, and at least for the damages aforesaid, and to have the money on the first day of Michaelmas term then next, to be rendered, &c."

The defendant pleaded to each count, *nul tiel record* of this writ.

The exemplification of *venditioni exponas* produced shewed a writ differing from that so set out, in this, that in the recital of the return to the *fi. fa.*, contained in the *venditioni exponas* it was said, "and you at that day returned to us at Toronto aforesaid that by virtue of the said writ to you directed, you had taken *goods and chattels* of the said defendant to the value of five shillings, which *said remained* in your hands unsold for want of buyers;" and the command was, "therefore we, being desirous," &c., "command you that you sell, or cause to be sold, the *lands and tenements* of the said defendant by you in form aforesaid taken."

The writ was exemplified truly as it was; and it appeared that in filling up the writ the clerk or attorney had in his haste taken a printed form of a *ven. ex.* proper to be used where goods have been seized, and had omitted in the recital to strike out the printed words "goods and chattels," and to insert "lands and tenements" instead; but when he came to the command which follows the recital, he did strike out the printed words "goods and chattels," and inserted "the lands and tenements by you in form afore-

said taken," though in consequence of his previous error no lands and tenements were stated to have been taken.

This was an error in the writ itself; but the ground of variance was, that in their declaration the plaintiffs set out a writ of *ven. ex.* containing a recital of a return to the *fi. fa.* differing from what the writ itself contained, alleging that the sheriff had returned that "he had taken *lands and tenements* of Brooks to the value of five shillings;" and this was the variance objected to.

Read, for the defendant, cited *Billing v. Hutchins*, 2 Exch. Rep. 297.

Hagarty, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

The defendant is clearly entitled to judgment, and it is not a case in which an application to amend the declaration could avail the plaintiff, for it is the writ itself, and not his recital, that requires amendment; and there can be no question about the materiality of the variance, although it is in the matter of the recital: because the alleged return of the sheriff is inseparably connected with the command, which is grounded expressly on that return. The plaintiffs, evidently, are endeavouring to get over an error in the writ itself, and in the record of it (which describes it truly) by setting out a part of the record untruly: but that would open the door to an abuse which the court could not countenance. The variance is in a most material part of the record, and one which could not be rejected as surplusage.

Judgment for the defendant.

STORY V. DURHAM.

A bailable *ca. re.* may be sued out in a county court from a commissioner, and may be executed by a constable, without taking it to the sheriff.

Quære—Whether a constable can be compelled to execute such writ, as it is not directed to him but to the sheriff, and the statute gives him no fee.

But if he undertakes the service and arrests the defendant, he is liable for an escape.

The plaintiff sued the defendant for voluntarily suffering one Smith, who was in his custody under a writ of *ca. re.* at the suit of him, the plaintiff, to escape.

The writ on which the debtor was arrested was sued out in a county court from a commissioner of this court for taking affidavits, and was directed to the sheriff.

It was proved on the trial that the plaintiff's agent placed the writ in the hands of the defendant, who acted as a constable: that the defendant did arrest Smith, and had him in his custody for some time, and afterwards very carelessly suffered him to escape.

At the trial before Mr. Justice Burns, it was objected for the defendant.

1st. That such a writ could not be legally executed by a constable.

2nd. that no such action will lie for escape against a constable on such process directed to the sheriff.

These objections the learned judge reserved for further consideration as grounds of a nonsuit.

The jury found a verdict for the plaintiff, and 25*l.* damages.

Eccles, for the defendant, obtained a rule nisi for a nonsuit on the leave reserved at the trial; or for a new trial on the law and evidence, or for misdirection. He cited *Jackson v. Hill*, 2 P. & D. 455; *Newland v. Cliffe*, 3 B. & Ad. 630.

Cameron, Q. C., shewed cause.

ROBINSON, C. J.—We do not consider that the defendant is entitled to succeed on either of the two points taken as grounds of nonsuit.

The statute 8 Vic. ch. 13, secs. 15, 16, & 18, clearly authorized a *ca. re.* in the district court to be issued by a commissioner, as in the Queen's Bench under the statute 2 Geo. IV. ch. 1, sec. 6, and as the act says, "with like effect," which means that the party need not incur the delay of taking it to the sheriff, but may put it into the hands of a constable, who may without further warrant arrest the defendant and take him to the sheriff; otherwise the purpose would be defeated which these clauses were evidently intended to answer. Then it seems to us that the constable not acting under any authority which can

make the sheriff responsible must be responsible himself to the plaintiff who employed him, as we assume any special bailiff would be who was chosen by the party, and to whom the bailiff had given a warrant at his request; or, as we assume any bailiff employed by the sheriff would be liable to him for an escape, when the sheriff is the person who has been made to suffer by his negligence.

I refer to *Demoranda et al. v. Dunkin et al.*, 4 T. R. 120; *Boothman v. the Earl of Surry*, 2 T. R. 5, 12; *Com. Dig. Escape*, B. 2. 3; *Watson on Sheriff*, 126, 129, 130.

It may be a question whether a constable could have been compelled to execute a writ not directed to him but to the sheriff and, which the statute merely says, applying the words of the ninth clause of 2 Geo. IV. ch. 1, to this case, "it shall be lawful" for any constable to arrest the party upon; and besides, we do not see that the statute gives the constable any fee for the service. Having undertaken the service, however, we think he is bound, if we look upon him as the mere servant or agent of the party, to perform his service with care and fidelity which the evidence shewed the defendant not to have done in this instance.

Rule discharged.

DOE DEM. MORGAN ET AL. V. BOYER.

Under 12 Vic. ch. 90, sec. 12, the president and treasurer suing on behalf of a building society must be the president and treasurer of such society at the time of commencing the action.

After trial of an ejectment brought upon a mortgage, at which leave was reserved to move for a nonsuit, the suit was settled and the costs paid by a third party, interested as an after mortgagee of the same property, the costs were paid without the defendant's authority.

Held that this payment could not affect the defendant's right to recover costs from the plaintiffs in case a nonsuit should be ordered; and consequently, the defendant having moved for a nonsuit, that it was still necessary to determine the point reserved at the trial.

The fact of a payment having been made under protest but without duress or assent on the part of the payee to any reservation of his right, would form no ground for an action to recover back the money.

The declaration was on a demise for seven years, stated to have been made on the first of August, 1851, by Morgan, president of the Newcastle District Building Society, and Beatty, treasurer of the said society.

The defendant on the 4th June, 1849, executed a mortgage of the premises in question to the lessors of the plaintiff, who at that time respectively held the offices of president and treasurer of the Newcastle District Building Society. The mortgage was to secure 300*l.* advanced to the defendant from the funds of the society, with a proviso that it should be void if the defendant should pay regularly the monthly instalments on his shares, with interest on the money advanced.

He made his monthly payments up to 1st of January, 1850, but none afterwards; and this ejectment was in consequence brought on the part of the society.

The defence set up was, that when this action was brought (some time in August, 1851,) the lessor of the plaintiff (Morgan) was not president of the society, but Mr. * * * * who had held the office since the 1st August, 1851, Mr. Perry having been the president from 1st June, 1850, to that day.

It was objected by the defendant, that the demise being joint the plaintiff could not recover, as one of the lessors of the plaintiff had no legal interest or right in the mortgage either at the time of the demise stated, or of bringing the action: that the action should have been brought in the name of the actual president and treasurer for the time being.

The point was reserved, and a verdict in the meantime taken for the plaintiffs.

Another action of ejectment was brought in the name of the same plaintiffs as president and treasurer, against the same defendant, on a mortgage of other premises given on the 28th November, 1848, to secure 100*l.*, with the same proviso as the other mortgage. The same objection was made, and the point reserved, and a verdict taken for the plaintiff.

Read, for the defendant, moved in each case for a non-suit on the leave reserved. He referred to 9 Vic. ch. 90, sec. 12.

At the return of the rule nisi the plaintiffs produced an affidavit of the plaintiffs' attorney made in each case—that

since the trial one Austin, to whom the defendant had made a second mortgage on the same property, had paid up the mortgage to the society in full, and taken a discharge of the mortgage from the lessors of the plaintiff; and had also paid the costs, subject however to taxation by the master.

On the part of the defendants affidavits had since been filed, stating—that Austin, having a mortgage on the premises in question in each suit, observing a printed notice published some days after the trial, that the Building Society would, on the 8th of November following, sell the property by public auction under a power given in the mortgages which they held, he (Austin) went with his attorney to the office of the society, and it was agreed that he should purchase from the society the two mortgages by private sale, the mortgages which they had taken admitting of their so disposing of them: that he consented to pay also the expense of advertising and the charge of their solicitor for preparing the necessary papers: that nothing was said at that time about the costs of these actions: that the sale was postponed on the 8th November; that a few days afterwards, he (Austin) and his attorney called again to arrange the matter, and to receive, as they expected, an assignment of the mortgages on paying the debts and the other charges just mentioned, when the plaintiffs' attorney first informed them that the costs of these actions, amounting to about 36*l.* must also be paid before the society would give up their mortgages: that they remonstrated against this as an unexpected demand, which they had no authority from Boyer to accede to, and which was not included in their previous agreement: that the plaintiffs' solicitor insisted that the costs must be paid or he would sell the property the next day: that they requested him to wait the issue of the motion for nonsuit, pledging themselves to pay the costs if the nonsuit should not be ordered: that the solicitor persisted that he would sell if the costs were not at once paid to him: that Austin thereupon, to avoid the sale, paid the costs with the other money, protesting that the plaintiffs were not entitled to it, and that he was advised he could

recover it back : " that the solicitor took the money notwithstanding the protest, and did not offer to return the same, or to annul the arrangement, unless they would pay the costs without protest."

M. C. Cameron shewed cause, and cited *Doe dem. Morgan v. Bluck*, 3 Camp. 447.

ROBINSON, C. J., delivered the judgment of the court.

The mere saying by a party making a payment that he pays it under protest, when there is no duress or compulsion upon him to pay, when the other party insists upon the claim as a right and gives no assent to any reservation of his right by the person paying : this, we think, does not leave it in the power of the party paying to sue for the money back, merely because he said that he paid it under protest. But here, if by the event of the suit the defendant would be entitled to costs against the plaintiff, it could not be in the power of Austin, a third party, to compromise that right by paying the debt and the plaintiff's costs, in order to answer any object of his own.

We therefore think that no acquiescence in the verdict on the part of this defendant can be inferred from what passed between Austin and the plaintiffs, so as to relieve the court from the necessity of determining the point reserved.

And, as to the point reserved at the trial, we think that the 9 Vic. ch. 90, sec. 12, clearly requires that this action should have been brought in the names of those who were president and treasurer at the time of commencing it, and that a nonsuit should therefore be entered.

Per Cur.—Judgment of nonsuit

DOE DEM. SHERWOOD ET AL V. MATTHESON.

Ejectment : The defendant proved that on the 19th of June, 1839, he bought the land in dispute at sheriff's sale, and on the 19th of August, 1842, received the sheriff's deed. The plaintiff produced the sheriff's receipt, dated 14th July, 1836, for all arrears of taxes due up to the 1st July, 1835. When this payment was made to the sheriff he held in his hands a warrant to levy the amount due for taxes on the land. The lot was duly advertised by him on the 4th June 1840, pursuant to the stat. 3 Vic. ch. 46.

Held, that as the payment was made to the sheriff, and not to the treasurer, the stat. 3 Vic. ch. 46 was not applicable; and that the plaintiff, having shewn an otherwise good title, was entitled to recover.

Ejectment for part of lot 6, in the 1st concession of Osgoode.

The title of the plaintiff was undisputed at the trial on any other ground than this, that the defendant claimed to be the owner as purchaser at a sheriff's sale for taxes, the validity of which sale the plaintiff disputed, on the ground that the taxes were not in arrear, but had been paid before the sale; and the question for consideration in the case was, whether the taxes were in fact so paid as to acquit the land, and to render the subsequent sale illegal.

The sheriff of Ottawa, under a writ authorizing him to sell for taxes, sold the land in question by public auction on the 19th of June, 1839, to the defendant, for 2*l.* 13*s.* 5½*d.*, for eight years' taxes then in arrear; and on the 19th of August, 1842, he made a deed to the defendant in pursuance of the sale.

But on the 4th of July, 1836, the then proprietor of the land had paid to the sheriff the sum of 3*l.* 13*s.* 1½*d.*, being the arrears of taxes due up to the 1st of July, 1835, and took his receipt, which was produced on the trial; and it was proved that when this payment was made to the sheriff he held in his hands a warrant to levy the amount due on this and other lands in his district.

The lot was duly advertised by the sheriff by notice, dated the 4th of June, 1840, pursuant to the statute 3 Vic. ch. 46, on the 4th section of which act the defendant relied for upholding his title, notwithstanding the payment made to the sheriff.

The learned judge held the plaintiff entitled to recover, for that the payment to the sheriff, while he held the writ commanding him to levy the money, was a good payment; and, the statute 3 Vic. ch. 46 not applying to the case, the land was acquitted, and the sale consequently illegal.

No evidence was given at the trial to account for the lapse of time between the expiration of the eight years, viz., 1st July, 1835, and the sale; nor for that between the sale in 1839 and the sheriff's deed in 1842; nor was it shewn how it happened that the land was sold, notwithstanding the payment made to the sheriff, and that the proprietor, throughout the whole period that elapsed before

the conveyance, had made no claim to have the payment credited or to redeem the land.

The jury, under the direction of the learned judge, (Draper J.), gave their verdict for the plaintiff, leave being reserved to the defendant to move for a nonsuit.

The stat. 7 Wm. IV., ch. 19, provides that all sales of lands for taxes shall take place in the district town, on the second day of the court of quarter sessions, at or near the court house, and shall be advertised accordingly; that the land shall be put up at 2s. 6d. per acre; if no bidder at that price, then to be sold according to the previously existing law, at the next general quarter sessions which shall occur after the expiration of the six months' notice required by law. The last clause enables the sheriff to put up and adjudge to the purchaser such part of the lot as he may think best for the interest of the proprietor. This act was passed on 4th March, 1837.

By 1 Vic. ch. 20, no sales for taxes of lands were to be made in the year 1838; after that year the same proceedings were to be taken which by law should be pursued before any lands shall be sold: Passed 6th March, 1838.

By 1 Vic. ch. 46 (passed 10th February, 1840,) recites that doubts had arisen on the construction of the two foregoing acts: that under color of them certain lands in the district of Ottawa, and which before the passing of 7 W. IV., ch. 19, were in arrears for taxes eight years and more, were sold by the sheriff to satisfy such arrears, although the period for which such sale was advertised commenced before the passing of 1st Vic. ch. 20; and makes valid the sales of lands in the district of Ottawa, effected in June, 1839, as if 7 Wm. IV. ch. 19 had never been passed; provided that the sheriff do immediately publish a list of all the lands sold by him as aforesaid, by advertising in certain papers named; and the sheriff may within two years from the date of those advertisements convey the lands so sold; *provided that this shall not make valid any sale for taxes where such lands were not liable to the rates and assessments, or to be returned by the treasurer as in arrear.*

The second section recites, that in January, 1834, the

greater part of the books, &c., of the treasurer of the district of Ottawa, were destroyed by an accidental fire ; and there is cause to apprehend that the lists which have been since made out of lands in arrear for taxes have comprised some lands on which the taxes have been paid, but of which payment no record remained in the treasurer's office ; and enacts—that the sheriff shall immediately publish a list of all the lands which have been sold for taxes since the 1st Jan. 1834. *Section 3rd* requires the sheriff to publish with such list a notice, requiring persons who had paid taxes on any of the lands in the list *prior to 1st May, 1835*, to produce to the treasurer, within three years from the publication of such list, any receipt signed by the treasurer, or an affidavit in proof of such payment which had not been credited. *By section 4th*—If the owners of such land neglect within that period to produce to the treasurer “due proof of the payment of the taxes in the manner hereinbefore directed,” the sales effected by the sheriff are declared valid.

Adam Wilson, Q. C., obtained a rule nisi to enter a non-suit on the leave reserved, or for a new trial on the law and evidence. *Cameron, Q. C.*, shewed cause.

ROBINSON, C. J.—Our opinion is in favour of the plaintiff. The land here was properly returned as being in arrear, and it is not denied that the writ to sell properly issued to the sheriff. There was no mistake on the part of the treasurer in returning the land as being liable to sale, when in fact it was not, on which ground the validity of the sale made in consequence has been in other cases questioned in this court.

But the complaint is, that while the sheriff held the writ commanding him to make the money, he was paid the whole amount due and gave his receipt, and yet went on and sold the land ; owing probably to the circumstance of the writ being a general one, embracing all the lands in arrear in his district, and of his inadvertently omitting to check the sale of this lot after he had been paid.

If there had been distress on the land, the sheriff, from the very words of the statute, and of the writ, could not have

made a legal sale; and it would be inconsistent to hold that he could make a legal sale after the owner of the land had actually paid him what he was commanded by the writ to levy.

Of the sheriff's right to receive the money, and that payment to him would discharge the writ, there can be no doubt (a). And it would be hard if anything in the 3 Vic. ch. 46, should expose the proprietor, under such circumstances, to the loss of his land; because it is very clear that that statute was not passed with any such view, but only for the purpose of protecting owners of lands who had paid their taxes to the treasurer against the danger of injury from the loss of the treasurer's books.

The loss of the treasurer's books could have nothing to do with this case, where it was the sheriff, and not the treasurer, who had received the money. And if the owner here should lose his land from not attending to the notice published under 3 Vic. ch. 46, that would be a consequence which could never have been intended by the legislature, because he was not relying on any payment to the treasurer, whose books were burnt, but on a payment made to the very officer who afterwards sold the lands as if he had not paid the money. Nevertheless if the legislature had incautiously framed their act in such terms as would make it apply to this case, there might be found no remedy except in an action by the owner of the land against the sheriff. But it is clear that for the reason pointed out, the statute, 3 Vic. ch. 46, has no application here; and that the plaintiffs stand on no other ground than that on which any party would at any time have stood whose land in any district had been sold by the sheriff, after the taxes had been paid to him in discharge of the writ then in his hands. The 3rd and 4th clauses of the act in clear terms apply to those cases only in which rates were paid *before 1st May, 1835*, and paid to the treasurer—for that, we think, is what the act clearly intends; but here the owner of this land paid the taxes *after 1st May, 1835*—viz., on 14th July, 1836; and not to the treasurer, but to the sheriff. The act there-

(a) Taylor v. Bekon, 2 Lev. 203; Bac. Abr., Execution D.

fore has nothing to do with this case, and it would not be reasonable that it should have.

DRAPER, J.—The facts of the case do not appear to bring it within the statute.

The taxes were unpaid after the 1st of May, 1835, and the warrant for the sale of lands was in the sheriff's hands to sell this, among other lots, for arrears. While he held this warrant, on the 14th July, 1836, the owner of this land, in order to prevent its being sold, went to the sheriff and paid him the money, which the sheriff was authorized to levy, either by distress, if there were any distress on the lands—otherwise, by sale of as much of the land as was necessary to raise such sum; and on that day the sheriff gave a receipt for 3*l.* 13*s.* 1½*d.*, in full for taxes due upon this land up to 1st July, 1835. Notwithstanding he had thus made all the money he was authorized to make by the warrant, he sold the land for the very money that had been paid to him, or for some part of it; the sum paid to him by the purchaser being stated in the deed to be 2*l.* 13*s.* 5½*d.* He had no more authority to sell the land, than he would have had if there had been an abundantly sufficient distress upon it during all the time the warrant was in his hands.

Per Cur.—Rule discharged.

KENNEDY V. THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF SANDWICH.

K. was employed in 1848 by the trustees of school section No. 4, in the township of Sandwich, acting under a by-law of the District Council, to furnish materials for and to erect a school-house in that section. Part of the money was paid to him on account, and for the balance he brought an action against the trustees, and recovered judgment. Finding no property of theirs on which to levy, he applied in 1850 to the Municipal Council of the township, who passed a by-law imposing a rate to satisfy his judgment: this by-law was afterwards repealed before the money had been collected.

It appeared that under the original by-law of the District Council, the rate for erecting the school-house had been levied, and the part not paid over to K. had been handed to the secretary-treasurer of the trustees, who absconded: and that K. was in possession of the school-house, and retained it for the money due him.

Under these circumstances the court held that the Township Council were not liable, and discharged a rule for a mandamus to them to pass a by-law for raising money to satisfy the claim.

Semble also, that if the applicant were entitled to recover, an action would lie against the council, and therefore no mandamus should go.

In Easter term last *Adam Wilson*, Q. C., obtained a rule to shew cause why a mandamus should not issue commanding the Township Council of Sandwich to raise 60*l.*, to be paid to Kennedy in discharge of a claim of his against the school trustees of school section No. 4 in the township of Sandwich, for building a school house in said section, (for which sum the said Kennedy had obtained a judgment against the school trustees in this court) according to a by-law of the said council made on the 16th February 1850 :

Or why the council should not pass a by-law for raising a sufficient sum to pay Kennedy 60*l.*, with interest from the 11th February 1850, in payment of his claim and judgment :

And why the said council should not repeal or declare void their by-law passed on the 10th December 1850, for repealing their by-law passed on the 16th February 1850.

From the affidavits filed in support of the application it appeared that in September 1848 Kennedy was employed by the Board of Trustees for school section No. 4 in the township of Sandwich, acting under 9 Vic. ch. 20, and under a by-law of the then District Council of the Western District, to furnish materials for and to erect a school house in the said school division, for which he was to receive 96*l.* 15*s.*

That he finished the building, having received during the progress of the work about 50*l.* on account:

That in February 1849 he brought an action against the trustees for the balance, and obtained a verdict, on which judgment was entered for 62*l.* 8*s.* 2*d.*, damages and costs.

That there being no property of the Board of Trustees on which he could levy, he applied in February 1850 to the Municipal Council of the township of Sandwich, who, in compliance with his application, passed a by-law in that month imposing a rate on the inhabitants of section No. 4, to raise money for the purpose of satisfying his judgment.

That in December 1850 another by-law was passed, reciting that the council had been applied to by petition, signed by a large majority of the resident rate-payers in the

school section No. 4, to repeal the by-law last mentioned ; and it enacted that the said by-law should be repealed, and that any money that had been levied under it should be refunded.

In answer to the application it was sworn :

That the by-law of the District Council of the Western District, under which this matter was begun, was passed on the 11th February 1847. It authorized 100*l.* to be raised by rate in school section No. 4, to be paid over to the secretary-treasurer, or one of the trustees of the said section, for the purpose of providing a school house therein ; and the trustees of that school section were to be held responsible for the proper application of the money.

That the rate under the above by-law was levied in 1848, and that the school trustees appointed for that year for section No. 4, after contracting with Kennedy, and having paid him 50*l.* on account, handed over 50*l.* to one Frederic Clark, one of their number, and their secretary and treasurer, for the purpose of paying the residue of Kennedy's claim ; and that Clark absconded without paying the money.

That in 1850 it was determined to give up the school house to Kennedy for the balance due him ; and he offered to accept it if the trustees would pay the costs of his action, which they declined : but that he locked up the house, took away the key, and had held possession ever since ; and that he had issued no execution on his judgment, nor taken any steps to enforce it.

The non-payment of the balance due to Kennedy was occasioned, it appeared, by an irregularity, in allowing the money to pass into the hands of a school trustee, instead of the treasurer retaining it until he could legally pay it to the contractor *on the order of the trustees.*

Vankoughnet, Q. C., shewed cause.

The statutes referred to appear in the judgment of the court.

The authorities cited were, *Regina v. the Victoria Park Company*, 1 Q. B. R. 288 ; *Regina v. the Hull and Selby Railway Company*, 6 Q. B. R. 70.

ROBINSON, C. J., delivered the judgment of the court.

There are several reasons which, in our opinion, must prevent our making absolute the rule nisi for a mandamus.

The applicant Kennedy has taken a remedy by action against the trustees, and has judgment in his favour; and the case of *Regina v. the Victoria Park Company* is a strong authority to shew that we could not direct a mandamus to go, ordering the payment to be made, merely because the execution may produce no fruits, in consequence of there being no corporation property seizable.

But it is even a stronger objection that Kennedy, who is asking us to give him the benefit of this prerogative writ, has actually obtained and still holds possession of the school house, as a means of enforcing payment of his demand for building it.

Besides this, when we look at the merits of the application, we see that it was the District Council that contracted this debt; and, under the 10th and 11th clauses of the 9th Vic. ch. 20, they took the proper measures for paying it, by causing the amount to be actually levied upon the inhabitants of the township, who have thus, under the compulsion of law, paid the amount over. We are asked to compel the present township municipality to pass a by-law for levying the same amount a second time upon the inhabitants, or rather a large portion of it, which it seems was paid by the district treasurer into the hands of the school trustees, or of one of them, who, instead of paying it to Kennedy as he should have done, has absconded with it. We cannot with any propriety do this: for the money, so far as the inhabitants of the township are concerned, went into the proper hands when the District Council or their treasurer received it; and they have paid the demand once and are acquitted. We might as well authorize a second levy on a debtor's goods because the sheriff improperly or by mistake paid the money made on the first levy to the wrong person.

And if, notwithstanding what has been done, it would be right to hold that the township of Sandwich still owes the balance to Kennedy, either as a debt of their own, or because that township is the locality in respect of which the District Council had contracted the debt, then we do not see why the 12 Vic. ch. 81, sec. 175, would not give an

action against the Township Council to recover it; and if so, no mandamus should go. (a)

The third subdivision of the 30th sec. of 12 Vic. ch. 83, does not extend, we think, to this case; so that the Township Council could, under its authority, levy a rate to pay for a school house that had been built for the District Council under the former law; and if it could be so applied, then it would follow that the rate could not be levied but at the request of a majority of the landholders and householders of the section: but in this case the majority are opposing it. We see nothing, indeed, in the new school law that favours this application.

The 38th clause seems also to be prospective, having no relation to debts contracted under the old law.

The 31st clause, part 3, of 12 Vic. ch. 81, seems to be wholly prospective, and to give authority only to the township councils to pay for school houses to be built thereafter.

It is not material to the decision of this case that we should ascertain whether the paying the money to the trustee who misapplied it was a payment sanctioned by law, or made against law. Under the 9 Vic. ch. 20, sec. 27, it would properly go into the hands of the trustee who was allowed by his fellows to act as secretary-treasurer; though there are other clauses of the act, as the 8th and 12th, that seem to shew a contrary intention. It is no wonder that the District Council or their treasurer fell into an error in regard to the person who was to receive the money, Though great care has evidently been used to preserve arrangement and consistency in the several statutes which concern this matter, yet we have found it not easy, in the multiplicity of clauses, to determine what the intention was in this respect; and we must consider, that whether a payment made in 1848 was properly made or not, must depend on the school law then in force. It is needless, however, to pursue that question further; because, for reasons which we have given, and which are independent

(a) Regina v. the Hull and Selby Railway Company, 6 Q. B. R. 70.

of that point in the case, we consider that we cannot properly grant the writ.

On the part of the defendants we have been asked that the rule should be discharged with costs. It is not a case under 9 Anne ch. 20, nor under 12 Geo. III. ch. 21. At common law, when a rule nisi for a mandamus has been discharged, the courts have given costs or not to the person opposing it, according to their discretion in each case. A discretion is now expressly given to the court by 14 & 15 Vic. ch. 109, sec. 35, to award costs to either party in such case.

Here the applicant has taken his remedy by action and obtained a judgment; and has also, as it seems, possession of the house for building which he brings his action: but, on the other hand, he may have obtained no actual redress by either means; and on the whole view of the case we do not give costs to the defendants.

Rule discharged without costs.

McLEOD v. McLEOD.

Action for seduction of one C. M., the daughter and servant of the plaintiff. Plea—that the said C. M. was not the servant of the plaintiff.

Held, that the plea was bad, for traversing an inference of law; and that the court could not intend that C. M. was a married woman in order to support it.

Declaration, for seduction of the plaintiff's daughter, one Catharine McLeod, with the usual averment, that the said C. M. was the servant of the plaintiff.

Plea—that the said C. M. was not at any, or either of the said times when, &c., nor is the servant of the plaintiff, as in the declaration alleged.

Demurrer, because the plea tenders an immaterial issue, and traverses a matter that it is not incumbent on the plaintiff to prove at the trial.

Solicitor General, for the demurrer, cited *L'Esperance v. Duchene*, 7 U. C. R. 146; *Hodgins v. Hancock*, 14 M. & W. 120. *Vanknoughnet, Q. C.*, contra, cited *Chamberlain v. Hazelwood*, 7 Dowl. 816; 5 M. & W. 515, S. C.; *Hart v. Aldridge*, 1 Cowper 54.

ROBINSON C. J., delivered the judgment of the court.

The second plea, which sets up as a defence that the said Catharine McLeod at the said time when, &c., was not, nor is the servant of the plaintiff, in manner and form, &c., is demurred to by the plaintiff, and we are of opinion that it is insufficient.

The statute 7 Wm. IV. ch. 8 sec. 2 enacts, "that upon the trial of any action for seduction brought by the father or mother, it shall not be necessary to give proof of any act or acts of service performed by the person seduced, but the same shall be in all cases presumed, and no proof shall be received to the contrary."

The plea does not deny that Catharine McLeod is the daughter of the plaintiff Alexander McLeod; but, admitting that she is his daughter, it denies that she is his servant; in other words, it denies what in all cases, where an unmarried daughter is seduced, is now by the statute established as an inference of law not to be controverted; and the plea seeks to bring in issue before a jury, as a question of fact, that which can no longer be disproved or traversed. (a)

Proof of actual service is no longer material, and therefore no issue can be tendered upon it; although, in order to preserve the principle on which such actions are maintained, and to retain them within their proper class of remedies, the legislature left the action to rest on its former foundation in point of form.

The plea, however, was attempted to be supported in argument by contending, that as the provision of the statute is plainly only applicable in the case of unmarried daughters, the plea would be a good defence if the daughter in this case were a married woman; and that as the declaration is silent in regard to the fact of her being married or unmarried, it stands indifferent and uncertain, and so the plea is sufficient.

But, in the first place, we find the daughter here called by her maiden name, the same name as her father; and,

in the next place, the principle of pleading is, that a plea in bar must be certain and precise, and shew all that is necessary to make the defence a good one ; for if ambiguous, or capable of two intendments, it will be taken in that sense most against the party pleading it, because it is necessary that his plea should on the face of it be a good bar. If the defendant had here stated that Catharine McLeod was a married woman, then he would have shewn that he was not traversing an immaterial fact when he alleged want of service. We cannot intend that she was married in order to make the plea good. (a)

Judgment for the plaintiff on demurrer.

MCMURRICH ET AL. V. THE BOND HEAD HARBOUR COMPANY.

In an action against a harbour company for refusing to register a transfer of stock by one S. to the plaintiffs,

Held, that although S., being president of the company might perhaps have registered the assignment himself, yet that the refusal of the secretary to do so formed a good ground for an action against the company.

Held also, that the company had no legal lien on the stock for harbour tolls due by S. to them, and could not, therefore, on that ground refuse to register the assignment.

Held also, that registration in the books of the company was necessary in order to complete the transfer.

Held also, as to four shares of which there appeared only an entry of credit to S. in a ledger, but which were not standing in his name in the stock book, that the plaintiffs were entitled to recover in respect of such shares.

Held also, as to the shares for which the plaintiffs were entitled to recover, that they were strictly entitled only to their value at the time of demand and refusal to transfer ; but the jury having allowed a larger sum, and this question not having been pressed on the argument, the court did not reduce the verdict.

The plaintiffs declared, that on the 16th of September 1850 one Short was possessed of divers—to wit, fifty—shares of stock in the Bond Head Harbour Company, standing in the books of the company in the name of Short, and transferable according to the act of incorporation : that the defendants are required by the act to register all transfers duly made : that Short's shares were paid up, and no transfer made to any other person than the plaintiffs : that Short by deed transferred his shares to the plaintiffs in trust to sell them, and to pay a debt due to the plaintiffs and other

(a) 1 Chy. Plg. 571 ; Pearce v. Campneys, 3 Dowl. 277.

debts due by him, Short, and one Dickson, his partner ; and offered to the defendants to sign any proper transfer in their books : that the defendants had notice of this assignment, and were requested to enter and register the same in their books, but refused to do so, whereby the plaintiffs have lost all the benefit of the assignment,—to their damage of 250*l*.

The defendants pleaded, 1st—Not guilty.

2ndly—That Short was not possessed of the said fifty shares.

3rdly—That the defendants had not due notice of the transfer.

4thly—That the defendants were not requested to register the transfer.

The jury gave a verdict for the plaintiffs on the first count for 111*l*. 18*s*. 9*d*. ; and for the plaintiffs 25*l*. on a second count, for another cause of action in trover, about which no question arose.

The proof was that Short had originally subscribed four shares of 6*l*. 5*s*. each, and paid them up in full ; and that seven shares were afterwards transferred to him by a third party in the company's books : that no scrip had issued : that Short and the plaintiff McMurrich came together to the secretary of the company, of which Short himself was then president, and desired him to transfer Short's stock to the plaintiffs, by registering in the books an assignment which Short had made to them. They produced the transfer, which the secretary would not read, for he refused to register any transfer from Short, giving as his reason that Short being indebted to the company for harbor tolls as a merchant, the directors had, at a special meeting duly called, resolved that his stock should be retained, and not allowed to be transferred.

It was objected that no breach of duty by the company was proved ; that Short being president could, if he had chosen, have registered the assignment himself, and the secretary could not have prevented him, wherefore the secretary's declining to do it could not subject the company to an action.

2ndly—That the paper not being opened and read, or shewn to the secretary, the company had in fact no notice of the transfer.

3rdly—That it is not indispensable that the transfer should be registered in the books, in order to give the transferee a title.

These exceptions were over-ruled, reserving leave to move for a nonsuit; and the jury were told that in the learned judge's opinion the plaintiffs had a right to recover; that as to the damages, he thought they should receive as much as would buy fifteen shares as they then stood, with dividends added to them.

Of the fifteen shares, four were explained to be not shares standing in Short's name in the stock book, but merely entered to his credit in a ledger in 1843; it was objected that at any rate there could be no recovery on account of those shares, as they were not standing in the stock book in Short's name. The verdict allowed damages in respect to *all*.

Vankoughnet, Q. C., obtained a rule nisi for a non-suit, or for a new trial on the law and evidence, and for excessive damages.

Cameron, Q. C., shewed cause.

ROBINSON C. J.—We cannot, on consideration of this case, see any reason why the plaintiffs should not recover.

In taking the transfer, it is true they acted for others as well as themselves, but it appears that their own debt exceeded 2000*l.*; and at any rate they would have a right to recover, and would hold the amount of damages on the same trust as they would have held the shares. We think the plaintiffs were entitled by the evidence to recover on all the issues, and that the exceptions taken at *Nisi Prius* were rightly overruled.

The case of *The King v. Bank of England*, Dougl. 524, shews that, in the opinion of the court, an undue refusal to register a transfer of shares, or to do whatever may be necessary for perfecting the assignment, will furnish a good ground for an action on the case; and many actions have

been sustained in American courts on the authority of that decision. (*a*)

The company, in the case before us, had no legal lien on the stock standing in Short's name in their books, and could not therefore deny his right to transfer it. The sixth clause of the statute 1 Vic. ch. 31, which constitutes their charter, gives them ample power to enforce immediate payment of tolls by seizing and detaining the vessels and cargoes on which such tolls are chargeable ; and they were in error in supposing that they could also lay their hands on the stock of the person indebted to them. Short then, for all that appears, had made a *bonâ fide* transfer for a good consideration to these plaintiffs, which the statute required to be registered in order to make it effectual, and it was the duty of the secretary having charge of the books to register it. Without registration in the books we take it to be an incomplete transfer, for the act requires the registration ; and without it the company would never know to whom they could safely pay the dividends, nor whom they could treat for any purpose as representing the stock.

It is of no consequence that the secretary did not choose to read or look at the transfer which was shewn to him. It was enough that he was told of the assignment, and that it was offered to be shewn to him.

Nor is it any objection to the plaintiffs' right to recover, that Short, being president, might perhaps in that capacity without impropriety have registered the assignment himself. It was more delicate that he should not go out of the common way to act upon his own assignment, and thus mix up his public and private relations to the company. The 10th cl. of the statute says merely that the transfer shall be registered in a book to be kept for that purpose by the company, and gives no particular direction who is to do it. We take it, in the absence of any evidence to the contrary, that the secretary was the proper person to do it ; and if so his refusal bound the company, and in this case he was acting in obedience to their special order.

(*a*) Angel on Corporations, 385 ; Sedgwick on Damages, 383.

We are of opinion, however, that the plaintiffs can recover only in respect of eleven shares ; for as to the four shares stated to be no otherwise standing in Short's name than that there is in a ledger, not in the stock book, an entry of a credit to Short of four shares of stock, which were neither subscribed for by him, nor assigned to him by any registered assignment, nor standing in his name in the stock-book, we think we cannot recognize the existence of any such shares.

In regard to the eleven shares standing in his name, the plaintiffs were entitled, as we think, to recover their value at the time of the demand and refusal to transfer, and were not strictly entitled to anything more. But the case was argued as if the only question intended to be submitted to us was, whether the present verdict should or should not be reduced to nominal damages ; and, looking on the case with that view, we discharge the rule.

Rule discharged.

THE QUEEN V. HUMPHREYS.

12 Vic. ch. 70 ; 14 & 15 Vic. ch. 66 ; 14 & 15 Vic. ch. 13.

The defendant on his trial upon an indictment cannot give evidence for himself, nor can his wife be admitted as a witness.

In this case it was reserved for the opinion of the court, under the late statute 14 & 15 Vic. ch. 13, whether upon the trial of the defendant at the last assizes for the counties of Leeds and Grenville, he, the defendant, offering himself as a witness in his own behalf, and his wife being offered as a witness for him, were both properly rejected as being incompetent by law.

Hagarty, Q. C., for the defendant. *Richards* contra.

ROBINSON, C. J.—We have no doubt that they were both incompetent ; that the first stat. 12 Vic. ch. 70, only relieves against the objection on the score of pecuniary interest, and has no reference to the ground on which a defendant in a criminal case, whether having such an interest or not, has been always hitherto rejected ; and that the latter statute, 14 & 15 Vic. ch. 66, has no reference to the defendants upon

the trial on indictments, because neither crime nor interest was the ground on which they had been hitherto excluded.

The stat. 12 Vic. ch. 70 only relieves against incapacity from crime or interest, by which we understand is meant interest of a pecuniary kind. The defendant on trial for a crime stands in neither situation; nor does his wife. They have both a deep interest in the event, but not such an interest, we think, as it was the object of that statute to affect.

Then the 14 & 15 Vic. ch. 66, only *recites* that it is desirable that in no case should *there be any exclusion of any person* from giving evidence. It does not enact that there shall *in no case* (i. e. civil or criminal) *be any exclusion* of any person from giving evidence. If it did, then, under such enacting words, we might feel ourselves bound to admit a prisoner's wife, and the prisoner himself; admitting that his statement on oath could be included in the words "giving evidence."

But what the last mentioned act really does is only this: it repeals the proviso in the first act which excepted from those to be admitted as witnesses, notwithstanding the objection of crime or interest, the parties individually named in the record, and thereby leaves the first statute to operate as if there were no such exception; in other words, it prevents crime or interest from being any longer an exception, even with respect to those individuals who are named as parties in the record.

But neither the defendant on his trial upon an indictment, nor his wife, were before excluded from giving evidence, "*either on account of crime or of interest*;" by which we mean, as we take the legislature to do, pecuniary interest. They neither of them stood in that situation that the verdict, according as it went one way or the other, would bring money or property to them, or take it from them, or render them liable to others.

An accused criminal on his trial, and his wife, might have an interest of this nature, it is true; but that had not been the sole ground, if at all the ground, on which their evidence was in all cases, and under all circumstances, rejected.

They had also an interest to save life, character, liberty ; regarding which interest as a ground of incompetency, and regarding the general policy of the law excluding prisoners on their trial from giving evidence in their own favour, and their wives from giving evidence either for or against them, the 12 Vic. ch. 70 did not profess to make any provision.

I will only add, for my own part, that this view of the law seemed to me to be clear, when the same points were raised in criminal cases before me on the last circuit ; and that, when I rejected the evidence of the prisoner and of his wife, as I did in a case at Niagara, it seemed to me that their admission was not pressed with any confidence at the bar.

**WILKES & BUCHANAN, PRESIDENT AND TREASURER OF THE
BRANTFORD BUILDING SOCIETY, V. CLEMENT & REID.**

Debt on a bond given by C. & R. conditioned for the due performance by one D. of the office of secretary and treasurer to the Brantford Building Society.

7th plea—That the office is an annual one : that the said D. was appointed for one year : that the defendants became sureties for the term of one year, and no longer : and that during such term D. faithfully performed the duties.

Replication—That the defendants did not become sureties for the period in the plea mentioned, or for any other specified time.

Held, on demurrer : Replication good.

Under the Building Society Act, 9 Vic. ch. 90, it is not essential to the validity of a bond given for the performance of the treasurer's duties, that such treasurer should be joined in it with his sureties.

9th plea—That D. did not, before his appointment, become bound in a bond, with two sufficient sureties, for the due performance of his office, in pursuance of the statute, &c.

10th plea—That the said bond is not a security taken in pursuance of the statute, by a bond entered into by the said D. with two sufficient sureties

Held, on demurrer : Both pleas bad for uncertainty.

11th plea—That the rules of the society did not provide that the treasurer, or other principal officer, should, once at least in every year, prepare a general statement of the funds and effects, according to the statute.

Replication—That the rules of the society did provide that the statement referred to in the plea should be made at least once in every year, according to the form of the statute, &c.

Held, on demurrer : Replication good.

Action on a bond against the defendants, as sureties for the due performance by one D. of the office of secretary and treasurer to the Brantford Building Society.

7th plea—That the said office is an annual office, and that the said D. was appointed to the said office on, &c.

to perform the duties thereof for one year, thence next ensuing: that the defendants entered into the said writing obligatory for the said term of one year, and no longer: and that during the said term the said D. faithfully executed his office.

9th plea—That the said office was, before and at the time of making the said writing obligatory, and before and at the time of the appointment of the said D., an office touching and concerning the receipt of monies collected for the purposes of the said society: and that the said D. did not, before his admission to the said office, become bound in a bond with two sufficient sureties for the just and faithful execution of the said office, &c., in pursuance of the statute in that case made and provided.

10th plea—That the said writing obligatory was not, nor is, a security taken in pursuance of the statute in that case made and provided, by a bond entered into by the said D. with two sufficient sureties, conditioned, &c. &c.

11th plea—That the rules of the said society did not, at the time of the making of the said bond and of the appointment of the said D., nor at any time before or since, provide that the treasurer or other principal officer of the society should, once at least in every year, prepare, or cause to be prepared, a general statement of the funds and effects belonging to the said society, according to the form of the statute, &c.

Replication to the 7th plea—That the defendants did not become sureties for the said D. for the period in that plea mentioned, or for any other specified time.

Demurrer to the 9th plea—Because it contains no defence to the action; and because it does not appear whether it is intended to tender an issue on the joining of the said D. in the bond with his sureties, or on the sufficiency of the sureties.

Demurrer to the 10th plea—Because it tenders an issue in law, whether or not the bond was so taken as to be legally binding on the defendants; and also tenders the immaterial issue whether the sureties were sufficient, and whether the said D. signed the bond with his sureties; and because it does not point out in what particular the bond was not legally taken.

Replication to the 11th plea—That the rules of the said society did, at the time of the making of the said bond and of the appointment of the said D., provide that the statement referred to in the plea should be made at least once in every year, according to the form of the statute, &c.

Demurrer to the replication to the 7th plea—That the said replication confesses that the office was an annual office, and does not avoid that confession by shewing a breach during the period in the plea mentioned; and that it attempts to raise an issue upon the law, and not on the facts; and that the replication should have denied that the office was an annual office, or that the said D. was appointed as in the plea alleged.

Demurrer to the replication to the 11th plea—Because the averment that the rules of the said society did provide that the statement referred to in the plea should be made, &c., is no answer to the material allegation that they should provide that the treasurer or other principal officer should make the statement, as the statute requires.

M. Cameron, for the demurrer, cited *Peppin et al. v. Cooper*, 2 B. & Ald. 431.

Vankoughnet, Q. C., contra, cited the *Attorney General of Jamaica v. Manderson*, 12 Jur. 383; the *London, Brighton, and South Coast Railway Company v. Goodwin*, 3 Exch. Rep. 320.

ROBINSON, C. J.—The ninth and tenth pleas both assume that the bond into which these defendants have entered is illegal, and not binding upon them, because Dee, the treasurer, on whose behalf they became sureties, is not joined with them as obligor in the bond. But we think we can only look upon the ninth clause of the Building Society Act, 9 Vic. ch. 90, as directory. The legislature, no doubt, enjoin that the treasurer should himself become bound, as well as find two sureties, for the due discharge of his duties; but it would be very unreasonable to hold, that because the company has not all the security which the legislature intended, they shall therefore have none.

There are cases (as in the instance of sheriff's bonds taken for ease and favour, but not in the form permitted by

the statute,) where, from regard to public policy, it has been held, that bonds taken in any other form or manner than the act directs shall be void : but we do not conceive that the present case is one of that class. There can be nothing prejudicial, or against public policy, in holding these defendants bound by their bond, although the principal is not joined with them. Nothing has taken place to alter their position since they gave their bond, to which they must have known the treasurer was not a party. The case of *Peppin v. Cooper et al.*, 2 B. & Al. 431, is rather an authority against the objection than in its favour : for there is nothing in this act declaring that the bond shall be void if not executed by the officer.

Besides, by comparing these pleadings with the pleadings in that case, it is evident that the objection intended to be raised here is not properly brought out. The bond is not set out on oyer, as it was in that case ; and it was therefore not apparent to us on the face of the instrument that Dee is not a party. The declaration, in averring that these defendants were bound, is not to be taken as averring that they alone were bound ; and the ninth plea does not assert that Dee is not a party to the bond, but says, in general terms, that the bond is not taken in pursuance of the statute—not pointing out in what particular it deviates. For all that appears, the defendant may mean that these are not sufficient sureties, or that the condition is not in the exact words prescribed by the statute, or that the bond was not taken until after Dee had taken upon him the duties of the office, whereas the statute requires it to be taken before. Indeed, I was under the impression, until I heard the case argued, that this last was the objection intended to be taken by the plea.

Then the tenth plea is equally uncertain in this respect ; it leaves us to conjecture in what respect the bond does not comply with the statute. It does not say, nor does it otherwise appear to us, that Dee did not execute the bond.

The seventh plea and the replication to it are to be considered, the defendants having demurred to the replication. We see nothing in the act or by-laws set out which

makes the office of treasurer an annual office, and yet that is the very foundation of the seventh plea. The defendants might, however, have only undertaken for one year; but that is not what they say, or can be fairly understood to mean: they first assert that the office is an annual one, and then, without denying that the plaintiff has set out their obligation truly, (which if they intended to deny they should have pleaded *non est factum*, or set out the bond on oyer and demurrer), they plead that the defendants entered into the bond as security for one year. They do not assert that the plaintiffs have set out the condition untruly in words, or that the bond does limit their engagement to a year, but only that they became sureties for him for a year, by which I suppose them to mean that the office, being an annual office, (which seems to be falsely assumed,) their undertaking for the due discharge of its duties must, in legal effect, be limited to the year. The plaintiffs answered this by saying that the defendants did not become sureties *for the period in the plea mentioned, or for any other specified time*. This surely does deny the truth of the plea, whether the defendants intended to rely upon an inference of law, or meant to affirm that such was the very language of the condition. We think *specified time* is tantamount to saying for any limited time—that is, for any time particularly expressed. In the case which was cited in the argument, and which I have before referred to, of Peppin v. Cooper, a defence of the same nature was pleaded, and was sustained; but there the plea was, that the officer was only appointed for a year, not, as in this case, that the office was an annual office, which rests the defence upon a legal principal rather than upon a fact; and we see nothing to shew that the office is annual.

The demurrer to the replication to the 11th plea must also, we think, fail. That plea is founded on the 15th section of the statute, which does require an annual statement to be made out and exhibited to the directors: but that is a duty not exclusively incumbent on the treasurer; and if it were, still his omission to perform it would constitute no reason why his sureties should be released from their

engagement for his faithful discharge of his duty. And if we regard it is an omission of the society, who are the real plaintiffs in this action. the omission would still be no reason, in a court of law, why the defendants should not perform the condition of their bond. They must save the penalty of their bond by shewing a performance of the condition, or an absolute incapacity to perform it by the act of God or of the law, or a clear legal discharge. There are some cases, however, in which courts of equity would relieve, where courts of law cannot ; but I do not express the opinion that this is one of them.

Judgment for the plaintiffs on demurrer.

WOOD ET AL. V. HUTT & CLEMENT.

Assumpsit, on two promissory notes, against the indorsers. Plea by one defendant—"no notice of non-payment."

A separate protest of each note was produced. One of these protests was dated on the day when the note fell due, and the other on the day after. They both certified that the indorsers had been notified but did not state when.

Held, that notice of non-payment was sufficiently proved as to both notes. By 7 Vic. ch. 10, a note indorsed by the bankrupt before commission issued, though not falling due until after, may be proved as a debt under the commission ; and to an action on such note against the bankrupt, the plea of bankruptcy is a sufficient defence.

Assumpsit on two promissory notes made by the defendant Hutt, payable to the defendant Clement or order, and indorsed by Clement.

Pleas by Clement—1. Denying notice of non-payment.

2. That after he endorsed the notes he became a bankrupt, and that the cause of action accrued to the plaintiffs before he became a bankrupt.

The defendant Hutt pleaded *non fecit*.

Verdict for the plaintiffs, 254*l.* 3*s.* 3*d.*, subject to the opinion of the court.

The notes were made on the 22nd of June, 1847, one payable in three, and the other in four years.

The questions raised only regarded the right to recover against Clement.

On the 25th of June, 1850, a notary presented (as he

certified under his notarial seal (the note payable in three years, at the Bank in St. Catharines, where it was made payable, and was told that there were no funds; and at the end of the protest he certified that he had served the indorser Clement with notice personally, not saying when he did so; but his act of protest was dated on the 26th of June, 1850, the day after the presentment.

The other note was presented at the same Bank on the 25th of June, 1851, as certified by the notary and the same answer made. He protested it on the same day, the 25th of June; and he certified "I have served them," *i. e.* each of the indorsers, of whom the defendant Clement was the first, "with a notice of these presents, by forwarding the same by mail to their address at St. Catharines and Georgetown, respectively."

This certificate was dated the 25th of June, 1851.

It was proved that Clement lived at St. Catharines. The notary who made the first protest had died before the trial.

It was objected on behalf of Clement that due notice was not proved, because the certificate did not state when the notice was sent.

The learned Chief Justice of the Queen's Bench, before whom the cause was tried, reserved for the opinion of the court the objection on the notices; and another objection, by the plaintiffs' counsel, that the plea of bankruptcy by Clement was not proved, inasmuch as his cause of action had not accrued when Clement became a bankrupt. His certificate of discharge was given on the 17th of August, 1849.

Vankoughnet, Q. C., for the plaintiff.—The protests shew as to the first note, that notice of nonpayment must have been given to the indorsers, either on the day when it fell due, or on the day after: if on the day after, it is clearly sufficient; and as to the other note, the notary certifies on the day when it became due that he had notified the indorsers. This is also a good notice, as the indorser did not pay.

As to the plea of bankruptcy, it could not have been intended by the 35th clause of the 7 Vic. ch. 10; that the

undertaking of an indorser should be proved as a debt, for it is not a debt but only a contingent liability.

The English statute, 6 Geo. IV. ch. 16, contains no similar clause to the 35th of our act, but the authorities there go to shew that a debt not due cannot be proved. *Brooks v. Rogers*, 1 H. Bl. 640; *Howis v. Wiggins*, 4 T. R. 714; *Hoskins et al., assignees, &c. v. Duperoy*, 9 East. 498; *Stary v. Barns*, 7 East. 435; *In re William Willis*, 19 L. J. Exch. 30; *Ex parte Thompson in re Wyatt & Thompson*. 2 Dea. & Ch. 126; *Ex parte Sir Chapman Marshall et al. in re John Fox*, 3 Dea. & Ch. 120.

W. Eccles, with whom was *H. Eccles*, contra.—The notices are not sufficient, for it is not stated in either of the protests that *due* notice was given or when. In the case of the second note it may have been given within banking hours, and therefore too soon. The protest of the second note does not say where each of the indorsers respectively reside.

The plea of bankruptcy is a good defence. The 35th clause of our act is clear, and leaves no room for question, using expressly the word *indorser*. The English decisions cited are therefore not applicable. But even there it is not clear that this claim could not be proved.—*Workman v. Leake*, 1 Cow. 22; *Macarty v. Barrow*, 2 Str. 949; *Lane et al. v. Burghart*, 1 Q. B. R. 933; *Chilton v. Whiffin et al.*, 3 Wils. 17.

ROBINSON, C. J., delivered the judgment of the court.

As to the notices of non-payment sent to Clement, we think both were sufficient.

The notary certifies on the 26th of June that he served notice on Clement of non-payment of the note due on the 25th. He must, according to his certificate, have served him either on the day when he so certified, or on the 25th. If on the 26th, he would have been in time: if on the 25th, the only question would be, whether that would be too soon or not, as the maker might have paid at any time on that day: but in *Hartly v. Case*, 1 C. & P. 556, *Abbot, C. J.*, says, that "notice of dishonour given on the day on which the bill is payable will be good or bad, as the

acceptor may or may not afterwards pay the bill. If he does not afterwards pay it, the notice is good; and if he does, it of course comes to nothing." This is manifestly consistent with common sense.

As to the notice of non-payment of the other note, that is certified to have been sent on the same day that the note fell due and was protested; and the same observation applies to it—assuming, as we must, in regard to this, that the notice was posted on the same day.

As to any objection to the form of the notice, none such was taken at the trial, and it would be extremely hard to allow any to be started now, especially when the notary, who gave the notice in one of the cases, is dead.

Upon the other point—the right of the defendant Clement to succeed on his second plea—we are of opinion that the effect of the 35th and 64th clauses of our statute 7 Vic. ch. 10, is clearly to make the proof that was given in this case a discharge under the plea.

The circumstance of the note not being due when the commission issued, although the defendant had endorsed it long before, can clearly not be held by us as affording any difficulty in the way of the holder proving under the commission as for a debt due to him: for the words of the 35th clause are express, and take in the very case of a note indorsed by the bankrupt before his bankruptcy but not falling due till after. Then, when we cannot deny that the holder might have proved as for a debt, the 59th and 64th clauses make the bankruptcy a good defence. Where the positive provision of our statute is so clear, it is to no purpose to inquire what would, under similar circumstances, be the rights of the parties under the different enactments of the bankrupt acts in force in England.

Postea to the plaintiff on Clement's first plea, and to the defendant Clement on the issue on his second plea.

CLARKSON V. HART.

Where a defendant applies for his discharge under 10 & 11 Vic. ch. 15, the court, or a judge, before whom such application is pending, may receive affidavits from the plaintiff contradicting the answers to interrogatories, or shewing that they cannot be true.

Dalton applied to discharge the defendant under the statute 10 & 11 Vic. ch. 15.

On the 6th of September, 1851, the defendant, Elizabeth Hart, served the plaintiff's attorney with notice of her intention to apply to be discharged under the statute.

On the 9th of September, 1851, she made an affidavit in the proper form, "*that she was not worth 5*l.* exclusive of her necessary wearing apparel and bedding, which do not exceed 10*l.* in value.*"

Interrogatories were filed, which were answered; and the plaintiff filed affidavits stating many particulars in which the answers were utterly false. There was no attempt, however, to shew that the defendant had, at the time of this application, any means in her possession, or within her control, by which she could satisfy the debt or any part of it. The reasons urged against her discharge were, that the manner of contracting debts with this plaintiff and with other merchants, to a large amount, and her conduct since, shewed a system of absolute swindling, carried on by combination with two or three other persons; and that if it be true, as she swears, that she is not now worth 5*l.*, it is because she has fraudulently sold for cash, and at a sacrifice, large quantities of goods which she had bought on credit, and has either squandered the proceeds, or conceals, and will not apply them.

The questions were—1st. In cases under the statute 10 & 11 Vic. ch. 15, can the court receive and act upon affidavits, contradicting the answers to interrogatories, or shewing that they cannot be true?

2nd. Is the court to consider anything more than the single question, whether it is made out that the debtor has or has not the means of satisfying the debt, or any portion of it, at the time of his making the application, without reference to the consideration whether he has fraudulently squandered his means, even since judgment was obtained

against him, and perhaps put them out of his hands with the express object of defeating the execution ?

Helliwell, contra.

ROBINSON, C. J., delivered the judgment of the court.

The statute 10 & 11 Vic. ch. 15 recites, that it is desirable to afford *additional means* for the discovery and application of the property and effects of *judgment debtors* in certain cases. And we should therefore not expect to find that the act closed the door to enquiries which before were open to the creditor, by rendering whatever statements the debtor might have the hardihood to make in answer to interrogatories unanswerable, which they were not before ; and by enabling the debtor to repose with confidence upon his answers, however false, and however capable of being disproved, provided he should only venture to go far enough to make them, on the face of them, satisfactory answers.

The first statute, 45 Geo. III. ch. 7, relieves creditors from the necessity of paying weekly allowance to the debtor, *if they can prove to the satisfaction of the court* that the defendant has secreted or conveyed away his or her effects to defraud his or her creditors. This places him under no restriction as to the time or manner of satisfying the court.

The 5 Wm. IV. ch. 3, secs. 5, 6, 7, shews the intention of the legislature to be, that the debtor shall be subject to rigid inquiry as to his statements, under the direction and at the discretion of the court.

The 10 & 11 Vic. ch. 15, repeals no former act. It first extends to a certain class of prisoners, not being execution debtors in the strict sense of the term, the same benefits and privileges as execution debtors then had by law in regard to gaol limits and weekly allowance ; and expressly subjects them to the necessity of answering interrogatories ; and to liability to recommittal *in like manner*, and by the same mode of proceeding in all respects as if in custody in execution for debt as a defendant. This can only refer to the then existing law, and especially to the 5 Wm. IV. ch. 3, sec. 5, 6, 7.

Then follows the 3rd clause, on which any question in this case directly arises. This, without expressly repealing,

and indeed without referring to any former provision then in force on the same subject, gives the proceeding which has been adopted in this case. It allows the debtor, on giving fifteen days' notice of his application, and on making affidavit *that he is not worth 5l., &c.*, to apply for his discharge at the end of the fifteen days; and enacts that it *shall be lawful* for the court, or a judge thereof, upon the return of a rule or summons to shew cause, for that purpose to be granted, to order the prisoner to be discharged from custody, provided he shall have satisfactorily answered upon oath interrogatories which the creditor may cause to be filed and served before the expiration of the said notice, in the same manner, and to the same purport, as prisoners in execution for debt, before the passing of this act, were required to do."

The 4th clause then enacts "that in all cases where interrogatories are satisfactorily answered by such prisoner, and a conveyance by him of any means or valuable interest of any kind he may have or be supposed to have, excepting his bedding, &c., made towards paying the claim against him; and to the satisfaction of the said court or judge, such prisoner shall, upon application to the said court or judge, be entitled to his discharge from custody: but such discharge shall not operate as a discharge of such prisoner's liability to pay the claim for which he was so in custody."

There then follows a provision to meet the case of persons rendered in discharge of bail, and to give them the benefit of the limits; and it enacts, that they shall remain upon such limits, and not depart therefrom "unless released therefrom by due course of law;" and that they shall obey "*all notices, orders and rules of court touching or concerning their remaining or continuing upon the limits, or being remanded or ordered to close custody therefrom.*"

This latter provision seems to refer to, and to contemplate as continuing in force, the provisions of 5 Wm. IV. ch. 3, respecting the inquiries and renewed inquiries to be allowed from time to time under the direction of the court.

We have consulted with the judges of the Common Pleas, in order that there may be an understanding as to the

practice to be pursued hereafter under this statute ; and we have determined that it is competent to the court or judge before whom an application for discharge under it is pending, to receive affidavits from the plaintiff in respect to the subject matter of the defendant's answers, for without that the plaintiff may be made to lose a debt, which he may be able to shew the defendant has abundant means within his control to pay, merely because the defendant has given false answers to his interrogatories.

The legislature in passing this last act have created difficulty by not repealing the former acts, and by making some provisions evidently in contemplation of their continuing in force while other provisions would seem as if designed to be substituted for them.

If the plaintiff could shew nothing to the court on his part, but must helplessly abide by the defendant's answers, without the opportunity of disproving them, then this absurdity would happen which the legislature could never have intended : that defendants surrendered by their bail, and afterwards charged in execution, and even prisoners committed in the common way on a *ca. sa.* being admitted to the limits, the plaintiff would have a clear right, under 5 Wm. IV. ch. 3, to apply by affidavit to commit them to close custody, and must be allowed for that purpose to shew by affidavit that they have the means of satisfying his debt : while at the same time the defendant would have a right, under the 10 & 11 Vic. ch. 15, to apply for his discharge from custody altogether ; and his application would depend on his own statements in answer to interrogatories, without the plaintiff being able to shew facts of which he may have the clearest proof, and which would be sufficient, under the act to consign him to the gaol.

In regard to the other question which applies more particularly to the case before us, we consider that the interrogatories in this case are not satisfactorily answered, which means, that we are not in fact satisfied from the defendant's statements that she has not under her control some means of satisfying the plaintiff's demand, although they may be means which an

execution cannot reach, and which an assignment would not affect.

We do not therefore grant the order for her discharge (a).

POWELL V. CURRIER.

It is not necessary in a declaration in trespass to aver that the offence was committed "against the peace of our Lady the Queen."
Held, that the description of the *locus in quo* in this case was sufficient under the new rules.

Trespass for breaking and entering "a certain dwelling house of the plaintiff, situated in Bytown, in the county of Carlton, and being on a certain lot sold by one Nicholas Sparks to the defendant, on the north side of Sparks street, in Bytown aforesaid."

The words *against the peace of our Lady the Queen* were omitted at the end of the declaration.

Demurrer : Because the said close or place in which, &c., is not designated by name or abuttals, nor by other sufficient description ; and because the said several trespasses are not, nor is any or either of them, laid to have been committed against the peace of the Queen.

Wilson, Q. C., for the demurrer, cited *Hudson v. Nicholson*, 5 M. & W. 437 ; *Harvey v. Brydges et al.*, 14 M. & W. 437.

Eccles, contra, cited *Morrell v. Capron et al.*, Chamber Reports, 144.

ROBINSON, C. J., delivered the judgment of the court.

We think the objection to the first count, that the *locus in quo* is not sufficiently described, to comply with the direction of the new rules, is not tenable ; for the rule only requires that the place shall be described by "name or abuttals, or other description," and we think the description given in this case is sufficient.

Upon the other point, the want of "*contra pacem*" in each count, I adhere to the judgment given by me in *Morrell v. Capron* (Chamber Reports, vol. 1. p. 144), that since the

(a) See *Campbell v. Anderson*, 1 Chamber Rep. 91 ; *Kirby v. Mitchell et al.*, do. 140 ; *Ryan v. Cullen*, do. 229.

capias pro fine has been abolished, that allegation in the declaration is no longer necessary, though the cases there cited shew that there is room for arguing the contrary upon authority, but I think not on reason or principle, since the fine has been dispensed with.

The statute 5 W. & M. ch. 12 abolished the fine upon the defendant in actions of trespass for the alleged breach of the King's peace, which fine had grown to be more nominal than real, forming a perquisite to the king's officers rather than any addition to the king's revenue : and that statute provided that the plaintiff should in such actions pay 6s. 8d. to the master in satisfaction of the fine, and should be allowed the same in costs. The consequence of this provision has been in England, that the *capiatur* is omitted altogether in the judgment in actions of trespass ; and we know that it is omitted also in entering such judgments in this court, and that there is not even the fee to the master in lieu of the fine, so that there is not here the least pretence of any kind for retaining the allegation that the trespass was *contra pacem*. And that being so, I could not see, when this case was before me in chambers in the case referred to, why the principle should not apply here on which the case of *Ilderton v. Ilderton*, 2 H. Bl. 145, was decided, when the court held that when the jury was allowed by statute to come from the country at large, and not necessarily *de vicineto*, the reason for stating a particular venue in the body of the declaration had ceased, and the want of it was therefore no longer a fault even on special demurrer. So also in *Read v. Brookman*, 3 T. R. 157, Lord Kenyon observed, "I remember hearing a demurrer attempted to be argued in this court, because the names of John Doe and Richard Roe were not added to the declaration as pledges to prosecute, in support of which it was said that in all the old books of entries there was no precedent to be found without them : but the court overruled the demurrer, saying that it ceased to be law when pledges ceased to be matters of substance." I retain the opinion which I had formed on a deliberate consideration of the point in chambers, when I was asked to over-rule a

demurrer as frivolous, though I had forgotten during the argument of this case that I had settled in that conclusion.

Per Cur.—Judgment for plaintiff on demurrer.

DOUGALL, AN ATTORNEY, v. OCKERMAN.

The defendant signed a written retainer of Messrs. D. & E. as his attorneys to prosecute one M. While the suit was pending the partnership between them was dissolved, and E. retired, assigning to D. all his rights. D's name alone appeared as plaintiff's attorney on the record. *Held*, that D. might sue alone for the costs.

Assumpsit for work and labour performed by the plaintiff, as attorney and solicitor for the defendant.

It was proved at the trial, that on the 12th of June 1846 the defendant signed a written retainer of Messrs. Dougall and Everett as his attorneys, to prosecute for him in a *qui tam* action against one Meyers.

The defendant's counsel objected that this retainer which was put in, being a retainer of Dougall & Everett, who were then in partnership as attorneys, Dougall could not sue alone for services rendered in the cause.

It was proved that Everett only continued about a year a partner with Dougall and then retired, transferring to him all his rights. On the *nisi prius* record in the *qui tam* action the name of Dougall alone appeared as the plaintiff's attorney.

The jury found for the plaintiff.

Wallbridge obtained a rule nisi for a new trial for misdirection, and for the reception of illegal evidence; and cited *Graham et al v. Robertson*, 2 T. R. 282.

Eccles shewed cause, and cited *Matchett v. Parkes*, 9 M. & W. 767.

ROBINSON C. J.—As to the legal exception that this plaintiff cannot recover alone, because the employment was under a written retainer by the defendant, not of the plaintiff alone, but of the plaintiff and Mr. Everett, we think we should not give way to it, for the retainer can only have been taken to have been given in that form, because the two happened at that time to be in partnership, not from any personal resolution of the client to commit his case to the

two jointly, and in no other manner. Then, having received such a warrant, the name of this plaintiff alone was in fact used in carrying on the business; he was the sole attorney of record; and, in addition to this, he alone, for all that appears, rendered the services and is entitled to the remuneration, for Mr. Everett soon retired from the firm.

Rule discharged.

EBERTS V. TRAVELLER.

Reference to compute—Interest recoverable in an action on a judgment.

The court refused a rule to compute interest before the master in an action upon a judgment, where it appeared that there might be ground for doubt as to the plaintiff's right to recover such interest, and the defendant resisted the application.

Quære—Whether under 2 Geo. IV. ch. 1 a plaintiff is entitled to interest from the time of entering judgment, where he does not enforce such judgment by execution, but brings a second action upon it after a lapse of several years.

Action of debt on a judgment of this court entered in 1834, in which latter case the now plaintiff was defendant, and obtained judgment of nonsuit against the now defendant, who was plaintiff in that first action; the judgment was entered for 17*l.* 13*s.* 5*d.* costs.

The defendant in the present action, being sued on that judgment, pleaded only a plea of *nul tiel record*, denying the judgment against him, on which issue was joined, and judgment given for the plaintiff in Hilary Term 1850.

Upon motion by *Eccles*, made in the Practice Court in this term, a rule nisi was granted, returnable in full court, to shew cause why it should not be referred to the master to compute interest on the amount recovered by the judgment. *Richards* contra.

ROBINSON, C. J., delivered the judgment of the court.

The case of *Bishop v. Best*, 2 Chitty's Reports 233, shews that the courts consider it to be quite within their discretion to grant or refuse a rule to compute before the master instead of assessing damages before a jury; and they have declined making the order to compute where the case is out of the ordinary course, and where there appears to be the

slightest ground for questioning what the plaintiff is in strictness entitled to recover.

I refer to the cases *Messin v. Lord Massarene et ux.*, 4 T. R. 493; *Blackmore v. Flemyng*, 7 T. R. 448; *Nelson v. Sheridan*, 8 T. R. 395; *Holdipp v. Otway*, 2 Saund. 107; *Denison et al. v. Mair*, 14 East 622.

It is suggested by Mr. Archbold, in his work on practice, that since the passing in England of the 1 & 2 Vic. ch. 110, sec. 17, the court would probably not refuse to refer to the master to compute in an action on a judgment, where the plaintiff seeks nothing more than the four per cent. interest which that statute allows; and we have no doubt that if they would do so, the circumstance of the judgment being for costs only would not prevent them.

But we must consider that, in the first place, it does not appear to have ever yet been done. This should not prevent our making the order, we think, if it is quite clear that whether the plaintiff goes before the master, or before a jury, he must recover the same amount, and that there is really no ground for contending that he should have more or less than the sum recovered by the first judgment, with the interest upon it. Now by the English statute 1 & 2 Vic. ch. 110 it is enacted, "that every judgment shall carry interest at four per cent. per annum until the same shall be satisfied, and that such interest may be levied under a writ of execution on such judgment." Under that provision there seems no reason to doubt, that in an action brought upon a judgment interest, on the first judgment, to the amount of four per centum, must follow of course; and if that be so we can see no sensible reason for declining to compute, for the cases sufficiently shew that the mere fact of the second action being on a judgment would not be a reason for not referring.

The provision of our statute 2 Geo. IV. ch. 1, sec. 19, which gives interest on judgments, is only this, "that it shall and may be lawful *in any execution* against the person, lands, or goods, of any debtor or debtors, for the sheriff to levy the poundage fees and the expense of the said execution over and above the sum recovered by the judgment, *together*

with the legal interest upon the amount so recovered from the time of entering the said judgment."

There is room to contend that under this provision, which only allows a plaintiff to indorse for the amount of interest where he follows up his judgment by execution; it does not follow, as of course, that a plaintiff who has obtained a judgment may, at his pleasure, waive execution on it and allow it to lie dormant, as in this case, for nearly seventeen years and then bring a second action on the judgment, and insist on recovering interest for the time he has delayed proceeding. We do not determine the point. It is sufficient that it appears to us that the master might have reason to view it as a debateable point, and that it is therefore fit to withhold the order for computation since the defendant resists it.

Rule discharged.

CHARLES V. CARROLL.

Assumpsit—The declaration contained counts for work and labour, goods sold, money paid, had and received, and on an account stated, to which the plaintiff pleaded non assumpsit, payment, and a set off. A verdict was taken for the plaintiff, subject to the award of W. H., chosen as sole arbitrator between the parties, "upon all matters in difference between them, as well in this suit as all other matters up to the commencement of this suit;" costs to abide the event. The arbitrator awarded "that the plaintiff had good cause of action against the defendant in the said cause, and on the matters so submitted, and was entitled to a verdict therein: and he assessed and awarded the damages to be paid by the defendant to the plaintiff in the said cause at 43*l.* 8*s.*"

Held, that the award was good: that it disposed by necessary inference of all the issues in the cause; and that it was not uncertain.

Application to set aside award.

In this case a verdict was taken by consent, at the assizes holden in March last at Woodstock for 150*l.* for the plaintiff, subject to be increased, reduced, or a verdict entered for the defendant for such amount as might be awarded by William Horton, Esquire, chosen as sole arbitrator between the parties, "upon all matters in difference between them, as well in this suit as all other matters up to the commencement of this suit."

The declaration was in assumpsit on the common counts,

and contained separate counts for work and labour, goods sold and delivered, money paid, money had and received, and on an account stated.

The defendant pleaded to the whole declaration, 1st. Non assumpsit; 2nd. Payment; 3rd. Set off.

The arbitrator made his award, in which, after reciting the rule of reference, he stated that he had examined all the witnesses produced by the parties, and had considered the proofs and vouchers before him; and he awarded "that the plaintiff had good cause of action against the defendant in the said cause, and on the matters so submitted, and was entitled to a verdict therein; and he assessed and awarded the damages to be paid by the defendant to the plaintiff at the sum of 43*l.* 8*s.*"

By the terms of the submission, the costs of the cause and of the reference were to abide the event.

In the following term (Easter) the defendant moved in the Practice Court to set aside the award—1st. Because the arbitrator did not decide all matters in difference, as he was bound to do, by the terms of the submission.

2ndly. Because the award did not dispose of each issue on the record.

3rdly. Because the award is uncertain, not stating what amount the plaintiff is entitled to recover in the action, and for which the verdict is to be entered.

4thly. Because the arbitrator rejected evidence that was offered to him to prove certain claims of the defendant upon the plaintiff which were within the submission.

A rule nisi was granted in the terms of the motion, and by consent of the parties it was enlarged, to be disposed of in vacation by a judge in chambers. Upon this consent it came on to be argued before the learned Chief Justice of the Common Pleas, and after much consideration of the case, he came to the conclusion that there was not any sufficient ground for setting the award aside, either on the legal objections raised, or for reasons stated in the affidavits: but, as he thought that one or two of the points might be considered not perfectly clear, he preferred not disposing of the rule in chambers, and left it to stand over

fo argument in full court in the next term. It was accordingly argued in Trinity term.

Hagarty, Q. C., shewed cause.

Ball, contra, cited *Beatty v. McIntosh et al.*, 4 U. C. R. 259; *Gisborne v. Hart*, 5 M. & W. 50; *Kilburn v. Kilburn*, 13 M. & W. 671; *Mortin v. Burge*, 4 A. & E. 973; *Maloney v. Stockley*, 4 M. & G. 647; *Rule et al. v. Bryde et al.*, 1 Exch. Rep. 151; *Brooks v. Parsons*, 1 D. & L. 691; *Crosbie v. Holmes*, 3 D. & L. 566.

ROBINSON, C. J., delivered the judgment of the court.

Having considered what has been urged on the argument in this case, and having examined the affidavits, we fully concur in the learned Chief Justice's view of the case, and are of opinion that the rule should be discharged.

The award does, we think, by necessary inference, dispose of all the issues in the cause. As to the second and third there can be no doubt; for if the plea of payment or set off had been established by the defendant so as to bar all claim of the plaintiff, it is impossible that the arbitrator could have made the award he did. As to the first issue, it is very true that for all we see it may be that the 43*l.* Ss. was found to be due on one or two only of the common counts, and nothing on the others: but the verdict in that respect is as certain as it usually is at Nisi Prius, where it is customary to find in one sum a verdict for whatever appears to be due on all or any of the common counts, and to take no notice of the others unless they have been separately pleaded to, or unless the defendant for some reason desires a verdict to be entered for him upon any count in regard to which no demand was proved. Every reasonable intendment should be entertained in support of an award; and it is not to be assumed that the defendant has not been found indebted to the plaintiff on all the heads of claim, making in the aggregate the sum for which the award was given.

We think the award is not uncertain, for it does expressly direct 43*l.* Ss. to be paid as damages to the plaintiff in the said cause. It is true that may be so construed as to mean only that the payment is to be made to the *plaintiff in the*

cause, not as the amount of damages in the cause ; but we are not authorized so to restrict it in order that we may hold the award void, when it is very capable of the other construction ; and such construction is the more natural one, for the arbitrator, after deciding that the plaintiff is entitled to a verdict, (which places him on the same footing as if he had a judgment by *nil dicit* in his favour), proceeds to say, that he assesses the damages to be paid by the defendant to the plaintiff in this cause at 43*l.* 8*s.* To read the award otherwise would be to make it insensible : for then the arbitrator would have directed a verdict without finding any amount, which, considering the terms of the reference, and that the arbitrator was a professional man, we cannot suppose he intended to do. It is consistent with all that is said in the award, that on a full consideration of all cross demands, and making just allowances on both sides, the arbitrator found that 43*l.* 8*s.* would remain due, and might be properly awarded as falling under the descriptions of claim included in the action.

The first and fourth objections are in truth the same : the affidavits filed on shewing cause state what, if true, would clearly disable us from interposing on the ground that the arbitrator refused to entertain and award upon anything which it was necessary he should settle. Yet, if the objection were only to be disposed of on that ground, and the defendant were to deny the truth of these statements, it might be proper that we should allow him an opportunity of repelling them. But without that we conceive the objection should not prevail, for the two causes of action alleged were not, within the fair meaning of the submission, "matters in difference" between the sheriff and his deputy at the time of this action being commenced.

Rule discharged.

THOMPSON V. LESLIE.

To an action for assault and battery the defendant pleaded, that he had been convicted of the trespass complained of before a justice of the peace, and so released from this action. The plaintiff replied "*nul tiel record*" of the conviction, and the court held the replication good.

Trespass for assault and battery.

Plea—that the trespasses complained of were committed after the passing of 4 & 5 Vic. ch. 27; that the defendant was convicted of the same before a justice of the peace, and fined therefor, and paid the amount adjudged to be paid, whereby and by force of the said statute he became released from any further action.

Replication, “*nul tiel record*” of the said supposed conviction: verification, &c.

Demurrer, because the replication tends to put in issue an immaterial fact, and a fact not alleged in the plea; and because the said replication should not have concluded with an averment and prayer to the court, but the issue should have been to the country.

Crooks, for the demurrer, referred to 4 & 5 Vic. ch. 27 sec 28, and cited Mansel on Demurrer 141; *Dyson v. Wood*, 3 B. & C. 449.

Wilson, Q. C., contra, cited *Basten v. Carew et al.*, 3 B. & C. 649; *Rex v. Eaton*, 2 T. R. 285; *Rex v. Midlam*, 3 Burr. 1720; *Massey v. Johnson*, 12 East. 67; *Collins v. Lord Viscount Mathew*, 5 East. 473; *Jackson v. Wickes*, 7 Taunt 30; *Glynn et al. v. Thorpe*, 1 B. & Al. 153.

ROBINSON, C. J.—The defendant here has pleaded the defence allowed by our statute 4 & 5 Vic. ch. 27, secs. 27 and 28, and has followed the form given in 3 Chitty's Pleadings (7th ed.) 322. We do not find that the statute authorising summary convictions for assaults allows of the payment of any portion of the fine upon conviction to the party aggrieved, as is stated in this plea to have been done.

But the question brought up by the demurrer is whether the plaintiff's replication is good. It is objected that it is not, for that *nul tiel record* cannot be replied to a plea setting up a conviction of this kind made before a justice. This, we apprehend, is a mistake. The plea must no doubt fail if no conviction could be shewn. The existence of such a conviction is essential to the defence—that conviction is a record, and a record of our own country, and so not provable, when directly denied, by an examined copy, as in the case of a foreign judgment, but by the production of the record itself. The case of *Collins v. Lord Mathew*, 5 E. R.

473, proceeds on that distinction ; and the course in such cases is to produce the original record of conviction, which may be made up by the justice at any time, and may be procured upon a writ of *certiorari* from this court, either to the justice, or to the quarter sessions if the record has been returned thither ; or perhaps it may be produced (when it can be so obtained) without the formality of a *certiorari*. In case of the death of the justice who made the conviction the writ may go to his executor. The replication to a plea of *nul tiel record* in such a case properly concludes with a verification ; and the trial is not by a jury, but by the court, who will inspect the record when produced ; and the day for producing it may be continued from time to time as may be found necessary.

The plea here does not aver a record, neither does the precedent in Mr. Chitty's work, from which it seems to have been taken. And it is objected that the plaintiff, by tendering an issue upon *nul tiel record*, is offering an issue upon a traverse of what had not been affirmed.

The want of a *prout patet per recordum* in the plea, however, is only objectionable on a special demurrer ; the plaintiff may, we think, notwithstanding its omission by the defendant, reply as if he had referred to it ; and the case of *Sandford v. Rogers*, 2 Wils. 113, and many later cases, seem to establish that the issue is complete when the party pleading a record either of the same court or another court, the party denying gives a day to bring the record in ; and that it is not necessary that the party relying on the record should have an opportunity of replying *quod habetur tale recordum*, for that there is a complete issue without it. (a)

We are of opinion that the replication is good, and the plaintiff entitled to judgment. (b)

Judgment for the plaintiff on demurrer.

(a) See Bac. Abr., *Certiorari* C. F. H. ; *Rex v. the Inhabitants of Ham-worth*, Str. 901 ; *Walker et al. v. Mackenzie et al.*, 1 Dougl. 4 ; *Adney v. Vernon*, 3 Lev. 243 ; *Rex v. Midlam*, 3 Burr. 1721.

(b) See *Tipping v. Johnson*, 2 B. & P. 302 ; 1 Saunders 92.

OTTO V. PELAN ET AL.

In an action on the case the second count of the declaration averred, that the plaintiff and defendants were possessed of adjoining closes, and that *by reason of their possession* it became the duty of the defendants to keep in repair the division fence; and in a third count it was charged, that the defendants, for the same reason, were bound to keep in repair half of the said fence.

Held on demurrer, both counts bad, as shewing no facts from which the duty alleged would accrue.

Quære—Whether since the passing of 8 Vic. ch. 20 an action like the present will lie.

Trespass on the case. The second count, after averring that the plaintiff and defendants were in possession and occupation of adjoining closes in the township of Osna-bruck, charged that “the defendants by reason of the possession of the said last mentioned close with the appurtenances by them as last aforesaid, during all the time aforesaid, of right ought to have repaired and amended, and still of right ought to repair and amend, a certain fence between the said close of the plaintiff and the said close of the defendants,” yet that the defendants wrongfully, &c., permitted the said fence to fall into decay, whereby cattle escaped from the defendants’ close into that of the plaintiff and destroyed his crops.

The third count averred possession of adjoining closes as before, and charged that the defendants “of right ought to have repaired and amended, and still of right ought to repair and amend, *a certain portion, to wit, one half* of the fence” between the said closes—yet that they had suffered the said certain portion—to wit one half of the fence—to fall out of repair, whereby, &c., as in the second count.

Special demurrer to each of these counts—Because since the passing of 8 Vic. ch. 20, no action will lie for not repairing the said fence—but the plaintiff should have proceeded in the manner pointed out by that statute;—and because the plaintiff does not shew, or allege, any facts from which the liability of the defendants to repair, as in the 2nd and 3rd counts respectively mentioned, arises, or from which the same may be inferred.

Solicitor General, for the demurrer, cited Boyle v. Tamlyn, 6 B. & C. 337.

Vankoughnet, Q. C., contra.

ROBINSON, C. J. delivered the judgment of the court.

There is no doubt, we think, that the plaintiff's 2d and 3d counts are bad, and that the defendants are entitled to judgment on the demurrers.

The plaintiff does not found his claim upon the defendants to keep in repair the division fence between them on our statute 8 Vic. ch. 20; but he assumes it to be an obligation arising at common law from the mere fact of the defendants' owning the land on one side of the fence; and from this mere circumstance of the defendants' owning the land next to the fence dividing them from the plaintiff's land the plaintiff deduces, in the second count, an obligation on the defendants to keep in repair the fence between them—that is, the whole fence;—and in the third count he assumes an obligation upon the defendants to keep in repair *a certain portion of the fence*, an obligation which might well be created by a proceeding properly taken under the statute called the Line Fence Act, but which certainly does not exist by force of the common law.

Whether since the statute an action like the present will lie, or whether the parties are not confined to the remedies given by the statute, is a question that we need not determine. The legislature seem, from the preamble in the first statute on this subject, 4 Wm. IV. ch. 12, to have assumed that there was no adequate remedy at common law in such cases, and we apprehend that all the duty which the common law throws upon any one in this respect is to see that his cattle do not intrude upon his neighbour in consequence of defects in his own fences. In *Boyle v. Tamlyn*, 6 B. & C. 337, the court say, "Every man is bound, by means of fences or otherwise, to prevent his cattle from trespassing on his neighbour, but he is under no legal obligation to keep up fences." One of the judges in that case observed, that an obligation might arise by agreement for one party to repair fences for the benefit of the owner of the adjoining lands; and, if there was proof of any such stipulation, he thought it would support the allegation that the defendant by reason of his possession was bound to repair; but that is doubtfully spoken, and is not confirmed by the other judges.

We think the plaintiff, when the common law imposes no such duty, should shew how it accrued, particularly since our statute prescribes a mode of settling and apportioning the duty.

Judgment for the defendant on demurrer.

THE MUNICIPAL COUNCIL OF FRONTENAC, LENOX, AND
ADDINGTON V. CHESTNUT ET AL.

A declaration in covenant stated that, by indenture made between the plaintiffs and defendants, the plaintiffs demised to the defendants the tolls authorised by law to be received upon a certain turnpike road, for the term of one year; that the defendants covenanted to pay a certain rent therefor; and *that by virtue of the said demise the defendants entered and were possessed for the term so to them granted.* Breach, non-payment of the rent.

Held on demurrer, that the defendants were estopped from denying the demise, and were bound by their express covenant to pay the rent, and that the non-execution by the lessors, under such circumstances, was no defence.

And that they were also estopped from alleging the want of a common seal of the plaintiffs to the lease, or from pleading that they had no authority to demise.

Held also, that a plea that the said indenture was not signed by the plaintiffs, or by any agent of theirs authorized in writing, was bad.

The Municipal Council of the United Counties of Frontenac, Lennox and Addington sued the defendants in an action of covenant for arrears of rent, averring in their declaration, that by indenture made between themselves and the defendants, they (the plaintiffs) demised to the defendants the tolls authorized by law to be received upon a certain turnpike road, for the term of one year, at a certain rent, payable monthly: that the defendants covenanted with the plaintiffs that they would pay the said rent to the plaintiffs in equal semi-annual instalments on certain days named: *that by virtue of the said demise the defendants entered and were possessed for the term so to them granted:* that a certain sum became due for rent: and that the defendants have not paid it.

The defendants craved oyer of the indenture, and it was set out; and it appeared on the face of the oyer as set out, that the alleged indenture was signed and sealed by D. Roblin, and by the three defendants. There was no mention made of D. Roblin in the body of the instrument, and

nothing added to his name to shew that he had by any statute a right to represent the corporation, or in what capacity, or why he was an executing party. The indenture purported to be made by the Municipal Council of the United Counties of Frontenac, Lenox and Addington, of the first part; and the three defendants, Chesnut, Foster and Smyth, of the second part: and in those covenants binding on the defendants the term was spoken of as created thereby, and the corporation was stated to have demised by their indenture.

The defendants pleaded, 1st. That the plaintiffs did not demise to them in manner and form, &c.

2dly. That the said indenture was not signed by the plaintiffs, or by any agent of theirs authorized by writing; nor was any lease of the said premises, so by the said indenture witnessed to have been demised for the said term in the declaration mentioned, put in writing and signed by the plaintiffs.

3rdly. That the said indenture was not sealed with the common seal of the plaintiffs, or signed by any agent of theirs; nor was any lease of the said premises, for the term in the declaration mentioned, made and executed under the common seal of the plaintiffs or put in writing and signed by any agent of the plaintiffs properly authorized.

4thly. That at the time of making the said indenture there was no by-law of the plaintiffs authorising them (the plaintiffs) to make the demise in the declaration mentioned.

The plaintiffs demurred to all these pleas, assigning for causes,

As to the first plea, that it contains no answer to the declaration; and that the defendants should have pleaded *non est factum*, or demurred.

As to the second plea, that it contains no answer to the declaration, and is an argumentative denial of the demise, and puts in issue matter of law.

And to the third and fourth pleas the same causes were assigned as to the second.

Kirkpatrick, Q. C., for the demurrer, cited *Dancer v. Hastings*, 4 Bing. 2; *Palmer v. Ekins*, 2 Str. 817;

Blake v. Foster, 8 T. R. 487. Taylor v. Needham, 2 Taunt, 278.

J. A. McDonald, Q. C., contra, cited *Wilson et al. v. Woolfryes*, 6 M. & S. 341; *Cardwell v. Lucas*, 2 M. & S. 111; *Berkeley v. Hardy*, 5 B. & C. 355; *Charles Lord Southampton and J. Drummond v. Brown*, 6 B. & C. 718 *Rose et al. v. Poulton*, 2 B. & A. 822.

ROBINSON, C. J., delivered the judgment of the court.

As to the first plea denying the demise, if that be a good plea under the circumstances, the plaintiffs must fail in this action for the specific rent, although the defendants, entering as their tenants, have enjoyed for the whole time for which the rent is claimed, and have expressly covenanted to pay the sum claimed as a consideration for that enjoyment; for we see plainly that the plaintiffs did not in fact demise by indenture; and so, if the plaintiffs had taken issue on this plea, denying the demise, they could not have proved the affirmation. They would, in that case, be left to seek another remedy, either by action for use and occupation, (which however, might not be found applicable to the case of tolls received,) or perhaps by action for money had and received, treating the tolls as received for their use. The latter, however would be a very imperfect way, because the plaintiffs have no knowledge what sums may have been received for tolls, and have no means of proving it. It is true that a jury might be warranted in assuming that the defendants received at least as much as they were willing to pay for the year's enjoyment; but they could not be called on as a matter of right to do so. We are of opinion, however, notwithstanding the lease has not been executed by the lessors, at least not in a manner legally binding on them, yet that the defendants having, as the declaration avers, entered and enjoyed during the term for which the rent is claimed, are bound by their express covenant to pay the rent; and that the non-execution by the lessors is, under such circumstances, no defence. As a general principle, a man is bound by his covenant under seal, though made without consideration, unless where it has been entered into not gratuitously, but on conditions which have not

been fulfilled on the other side. Here the defendants have expressly covenanted to pay to the plaintiffs the exact amount now claimed, and to pay it for the enjoyment of the tolls which they have actually had; and, though the lessors have not actually executed the lease, or have only done so in a manner not binding, still the good sense of the thing is to look upon the covenant to pay the rent to the plaintiffs as an independent covenant—the defendants not being in a situation to claim exemption by reason of eviction, or any obstruction to their enjoyment. The defendants could not have pleaded that the plaintiffs had no right to make the demise; and yet that would have been a fact as conclusive against there being a valid demise as a defective execution, or a total omission to execute, can be.

In *Wilson et al. v. Woolfryes*, 6 M. & S. 341, there could be no question about the plea, which was the ordinary plea of *non est factum*, and which of course only denied that the deed was the deed of the defendant; but it is true that the court held here (though Bayley, J., doubted, and I think not without reason,) that the plaintiff could not succeed on that issue, because they had themselves not all executed the indenture. That case presented, however, a different question, and in a different form; and for all that appears, the plaintiffs there were claiming their rent merely on the ground of having created the term; for it is not averred that the defendant had entered and enjoyed.

I do not, however, say that this case is not difficult to be reconciled with a judgment sustaining the demurrer to be first plea in the case before us. So also *Berkeley v. Hardy*, 5 B. & C. 355; *Rose et al. v. Poulton et al.*, 2 B. & Ad. 822; and *Cardwell v. Lucas*, 2 M. & W. 111; in appearance, at least, make strongly against the plaintiffs on this demurrer; not, indeed, the decision in *Rose v. Poulton*, because there the court sustained the action on the covenant to pay an annuity, although the other party to the deed had not executed; but in giving judgment, Lord Tenterden, while he did not assent to the position that a mere failure of consideration would in all cases relieve a party from

the obligation of his deed, remarked that "in the case of a lease not executed by the lessor, it certainly does, because, *in default of such execution, there is no lease.*" This opinion so broadly expressed has been relied on in this case, as it has in subsequent cases in England, for supporting the position, that a lessee who has entered and enjoyed for the term will nevertheless not be liable on his covenant to pay rent unless the lessor has executed the deed.

In *Cardwell v. Lucas* it was denied in argument that it could be taken as an authority to the full extent, for that in that respect it was an extra-judicial opinion, and the other judges said nothing to confirm it; and certainly the judgment in *Cardwell v. Lucas* proceeded on a peculiar ground, independent of that principal and one that does not apply in the present case, where the lessors named in the deed are themselves suing the covenantors. In such a case, where the intended lessee has enjoyed during the term the statement of demise should in reason be considered as matter of inducement not traversable when he is sued on his own express covenant to pay simply a sum of money, and not, as in some of the cases to do certain acts *during the term*, which implies a necessity that there should in fact have been a term legally created; and I am glad to find that what is so clearly in accordance with the justice of the case seems well supported by authority. It is stated in *Rex. v. Stacey*, 1 T. R., 4, by Buller J., that "where a person assents to an act, and derives and enjoys a title under it, it shall not lie in his mouth to impeach it."

In *Com. Dig. Pleader*, 2, W. 48, it is laid down, that the tenant cannot plead *non demisit* if the demise is by indenture, which I take it to be certainly true where the tenant has entered and enjoyed.

In *Parker v. Manning*, 7 T. R. 539, Ashurst, J., observes that "so long as the lessee continues to enjoy the land demised, it would be unjust that he should be permitted to deny the title *under which he holds possession*," which observation it seems reasonable to apply not merely to the title of the lessor in the land, but to the validity of the lease under which the lessee has entered and enjoyed, and

by his covenant admitted himself to be taking. In *Hodson et ux. v. Sharpe et al.*, 10 E. R. 350, the plaintiffs sued the defendant on a covenant to repair. The lease required to be registered under a particular local statute. The defendant pleaded that it was not registered, and was therefore void; to which plea the plaintiff demurred. The Court held the plea bad for that the defendant had had all the benefit which he could derive under the lease, and could not set up that it was not registered. And Bayley, J., said, "here the defendant has enjoyed under the lease during the time in which the breaches of covenant were committed; and therefore, even if the lease were void," (which as between the parties the court held was not the case,) "I should have been much disposed to have considered that he was liable on his covenant as an independent covenant."

Now that was a covenant to repair *during the term*, and was therefore not so strong a case in favour of the plaintiff as the present, which is a covenant to pay a sum of money, which would undoubtedly have been a good covenant if it had bound the defendants to pay the same sum to the plaintiffs provided they should be allowed to receive the tolls for a year without explaining what connection the plaintiffs had with the tolls, and without alleging any demise.

What Bayley, J., threw out somewhat doubtingly in this case has been expressly adjudged in later cases. I refer particularly to *Cooch et al. v. Goodman*, 2 Q. B. R. 580, in which the judgment of the court is, in my opinion, decisive in favour of the plaintiffs on this demurrer—supporting the principal that when the lessee in an intended lease enters and enjoys the term he cannot dispute his liability under his covenants with the intended lessor on the ground that such intended lessor did not execute.

The case of the *Fishmongers' Company v. Robertson*, 5 M. & G. 131, is strong to the same effect. I refer also to *Chanter v. Dewhurst et al.*, 12 M. & W. 823; and to *Pistor v. Cater*, 9 M. & W. 315, though the last case is not so much in point as *Cooch v. Goodman*.

Mr. Platt, in his work on Leases (vol. 2, pages 15 and

396) and Mr. Addison in his treatise on Contracts, page 185, evidently treat the principle I have stated as being established by these later decisions. Mr. Addison's language is express.

"If a lease (he says) be agreed upon, and the lessor does not execute his part, so that the term of years in the land bargained for is not created and transferred to the intended lessee, the covenants in the indenture sealed by the latter cannot be enforced: for the foundation of the covenant failing, the covenant also fails. If, however, the intended lessee has entered into possession of the land, and has had the use and enjoyment of the premises intended to be demised to him during the time that the breaches of covenant were committed, he will not be permitted to rely on the non-execution of the lease by the intended lessor as releasing him from liability, but he is bound to fulfil his covenant as an independent covenant."

The declaration in this case does expressly allege that the defendants entered and enjoyed for the time for which the rent is claimed; and they are estopped, while they admit this, from denying the demise, and giving that as a reason why they should not pay the rent which they have expressly covenanted to pay to these plaintiffs for what they have so enjoyed; or from alleging the want of a common seal of the plaintiffs to the lease; or from pleading, as in the fourth plea, that they had no authority to demise.

As to the second plea; It has been determined in *Aveline et al. v. Wilson*, 4 M. & G. 801, and in other recent cases, that even when the term is much more than three years, and so within the Statute of Frauds, this would be no good plea. The Statute of Frauds, at any rate, has nothing to do with this case of a lease for one year; and indeed this plea seemed not to be attempted to be supported on the argument. There should be judgment for the plaintiffs, we think, on all the demurrers.

My attention has been called to a late case of *Pitman v. Woodbury*, in the Court of Exchequer (3 Exch. Rep. 4) as tending to shake the authority of *Cooch v. Goodman*. If it had expressly over-ruled it, we must then have considered

by which of the conflicting decisions we should abide ; and that must have depended upon which of the two seemed to us to be best supported by previous authority as well as by reason ; for we are not, of course to give way to a decision of the Court of Exchequer directly at variance with a previous decision of the Queen's Bench, merely because it is the latest. But that case does not over-rule *Cooch v. Goodman*, though it intimates a doubt of its soundness. The Court expressly says that the two cases are distinguishable ; and they decided *Pitman v. Woodbury* as they did, assuming *Cooch v. Goodman* to be correct. I think it quite clear that *Pitman v. Woodbury* was rightly decided ; for there it was pleaded that the defendant never had entered or enjoyed under the lease, but on a distinct footing.

Per cur.—Judgment for the plaintiffs on demurrer.

BRENNAN V. PRENTISS.

By the 14 & 15 Vic. ch. 66, the parties to a suit are admissible as witnesses in their own behalf.

Assumpsit on a promissory note made by the defendant on the 1st of May, 1850, payable in ten days to the plaintiff, for 163*l.* 17*s.* 9*d.*, with common counts for wages, and on an account stated.

Verdict for the plaintiff for 83*l.* 15*s.*

Vankoughnet, Q. C. obtained a rule nisi, for a new trial on account of the rejection of legal evidence, and upon the law and evidence, and for the discovery of new evidence.

Henderson shewed cause.

ROBINSON, C. J.—I think on the facts proved in this case, independently of the legal question upon the rejection of evidence, it would be proper to grant a new trial. But if granted on this account, it would probably be on the condition of paying costs. The defendant asks for it on another ground, which he contends entitles him to it on more favorable terms ; I mean an account of the learned Chief Justice of the Common Pleas having refused to admit the defendant *Prentiss* to be sworn and give evidence on his own

behalf at the trial, which his counsel claimed as a right allowed under the recent statute 14 & 15 Vic. ch. 66.

It happens that I have prejudged this question, which is a very important one, for going early upon the circuit the point was submitted to me at the assizes at Niagara, a very few days after the act was passed, and before a judicial opinion had been given upon its construction in any other quarter. The claim to have the defendant examined in his own behalf took me by surprise, for I had not seen the act in print in the form in which it had been passed, but I had heard it spoken of, and was under the impression that it had not been resolved to make so extensive a change in the law of evidence as to admit the parties in a civil suit to give evidence in their own behalf. When the statute was handed up to me from the bar, upon the trial of the case which I refer to, I expected to find that it would not admit of such a construction, or rather would not call for it, for I confess my inclination and feelings were against an innovation to that extent, and I hoped to find that the legislature had not sanctioned it.

To allow either the plaintiff or the defendant in a suit to put his opponent to his oath, and question him upon the justice of his claim, or of his defence, as a defendant is compelled to answer upon oath to a bill filed against him, is a very different matter from allowing a party to swear a sum of money into his pocket by supporting his own action, or to take his neighbour's property by proving his case upon his own oath. I confess I have a repugnance to such a system, and my experience in courts of justice would have made me slow to adopt it, even in deference to the example set us by the Imperial Parliament, until time had been allowed for discovering the advantages or disadvantages of the experiment. There is great good sense, I think, as well as felicity of expression, in the passage of Lord Chief Baron Gilbert's Treatise on Evidence, in which he assigns the reason why the common law does not allow a plaintiff or defendant to be a witness in his own cause, "for these (he says,) are the persons who have a most immediate interest, and it is not to be presumed that a man who com-

plains without cause, or defends without justice, should have honesty enough to confess it."

When I was suddenly called on at Nisi Prius to determine whether the statute just passed did or did not allow the parties to a suit to give evidence in their own behalf upon the trial I was surprised to find that the statute did seem very clearly to admit it; at least, the language appeared to me so comprehensive and distinct, that I did not feel I could but a refusal to receive the defendant, who in the case before me desired to be sworn, upon any plain ground, though, as I have already said, I had a strong impression that the act was not intended to have that effect. I had afterwards, while the assizes continued, an opportunity to consider the matter more at my leisure, and I did not feel that on deliberate consideration of it I could take any other view, for of course we must look into the statute itself for its meaning, and cannot act upon any information as to what the framer of it intended. I had to give such a construction to it as I believed would be concurred in by my brother judges.

After my circuit was ended, I learned that not long after I had decided the point, so far as regarded my own practice for the time, the same question has come before the Court of Chancery, in a case of *Fuller v. Richmond*, reported 2 Chan. Rep. 509, and that the decision was, that a party to the suit was not admissible as a witness on his own behalf. I have read the judgment of that court, and it states the reasons for their construction very intelligibly. If my brother judges concurred in that construction, I should have no difficulty in acquiescing in it, for I would rather at present that the law rested in this respect on its own footing; and if the legislature should consider that we have misconstrued their act they could easily put an end to any further misconception. Now, however a considerable number of cases that were tried on the last circuit are affected by the question, whether the evidence of parties was rightly received or rejected, and the parties are entitled to our opinion as to which construction is really the right one. I admitted the parties to be sworn in several cases, and I

believe three of my brother judges have on their circuits applied the act as I did, while the learned Chief Justice of the Common Pleas has determined otherwise, and held the parties inadmissible, as indeed he did in the case now under consideration.

We are not at liberty to read the act with any impression upon our minds that the legislature could not reasonably have intended to allow parties to give evidence in their own behalf, because since justice was first administered in this province, both plaintiffs and defendants have been allowed in the Courts of Requests, as they are now in the Division Courts, to give evidence on their own behalf, where the debt sued for is of small amount; and we know that in England at the present moment a defendant would, under a statute lately passed there, be admitted as a witness in his own behalf in just such a case, and under exactly the same circumstances as the defendant desired to be admitted in the case now before us. We should not be warranted then in looking at the statute with a conviction on our own minds that the legislature could not possibly have intended to allow parties to be sworn to support their own cases.

The first act of our legislature on this subject, 12 Vic. ch. 70, enacted "that no person offered as a witness shall thereafter be excluded by reason of incapacity from crime or interest from giving evidence on the trial of any issue joined in any suit, civil or criminal, in any court; but that every person so offered may and shall be admitted to give evidence on oath, notwithstanding that such person may have an interest in the matter in question, or in the event of the trial of the action in which he is offered as a witness, and notwithstanding that such person offered as a witness may have previously been convicted of a crime.

"Provided, that this act shall not render competent any party to any suit or action individually named in the record, or any lessor of the plaintiff, or tenant in possession in cases of ejectment (with one or two other exceptions), or any person in whose immediate or individual behalf any action may be brought or defended, or the husband or wife of such persons respectively."

If the first part of this clause had stood alone—that is, without the proviso—I should have hesitated, I think, in coming to the conclusion that the parties to a suit were to be received under it—at least in their own favour, and especially if no such thing had been ever before allowed either here or in England, to which country we are in the habit of looking for example. The words “offered as a witness,” might have seemed to me to point to a party standing in a distinct position from that of the parties to a suit. But the *proviso* affords a strong argument that the legislature conceived they had used words sufficiently comprehensive to include the parties to a suit, and indeed all persons in all circumstances, if they did not take care by a proviso to except all whom they thought it prudent to except. And they have after all, even by this statute, rendered competent witnesses all parties to a suit except parties *individually* named in the record; so that, even if the later act had not been passed, I do not see that we could have refused the testimony of the members of any incorporated trading company in an action brought in the corporate name, although the pecuniary interest would have been as direct, and might have been much greater than in most cases where a party is suing in his individual name.

Then comes the late act, 14 & 15 Vic. ch. 66, which commences by reciting, that the former act did not render competent any party to any suit or action individually named in the record, or the husband or wife of such person respectively, (noticing also the other exceptions contained in the proviso in the first act) and stating *that it is desirable that in no case should there be any exclusion of any person from giving evidence*, but that all persons should be admitted to give evidence on oath *as thereafter provided*; and then it enacts, immediately after this preamble, “that the said proviso in the first recited act shall be, and the same is hereby repealed: provided always, that no married woman shall be allowed as a competent witness in any civil proceeding either for or against her husband.”

Now, if this act had stopped here I think we must have

held, that the legislature intended and considered, that having cancelled the proviso in their first act, and left the clause to stand without it, the consequences would be, that *in no case* could there be *any exclusion of any person* from giving evidence in a suit on account of incapacity from crime or interest; and that parties individually named in the record would thenceforth be received as well as others and that the single exception would be, that a wife could not give evidence for or against her husband—an exception made from a deference to other considerations than the bias of pecuniary interest; for the sake, that is, of preventing occasions of dissension and suspicion between husband and wife, or anything that might disturb the harmony or check the unreserved confidence that should prevail between them: and if the legislature had left this act to stand thus, without adding anything to the first clause, they might still with propriety have said as they have in their preamble, that all persons should be admitted to give evidence *as thereafter provided*, which means no more, in general, in recital, than that the legislature deems it expedient for certain reasons to enact *what is thereafter enacted*.

It does not seem to me that we can safely lay so much stress on those words as to hold that they restrain the effect of the first clause in the former statute, even when stripped of the proviso, to the limit within which its effect would be confined by the second clause of this last act, if that clause had stood by itself without the first clause.

I do not consider that second clause in the last act as being the only thing in that act which enables the parties to a suit to be examined at all, so that we can stop where that stops, and allow nothing to be done except what that clause permits. The first clause has the effect, I think, of making a perfectly clear field for the reception of evidence in civil cases, with the one only exception of the wives of parties.

But admitting parties to give evidence notwithstanding their pecuniary interest in the cause, was one thing; and it might have been contended (if the second act had gone no further) that to compel parties to give evidence against their

own interest or to disclose the defects of their own titles, and the weakness of their own case, was quite a distinct matter. Hitherto that had been prevented in courts of common law, and in a measure in equity, not on the ground of pecuniary interest to the witness, (for that objection could not apply where his adversary called him and was willing to give him notwithstanding the bias) but it was the policy of the law to prevent it on other and very obvious grounds. The legislature, however, did mean that thereafter parties should be called to testify against their own side, as well as admitted on their own behalf: that they should not merely be *admitted notwithstanding their interest*—which was all the first act, and the first clause of the second act, when construed in connection, would have done—but that they should also be liable to be called upon by the opposite party to give evidence against their own interest, whether they desired it or not. It may have been considered that merely making the parties *competent* witnesses notwithstanding their interest, would not be taken to compel them to be witnesses where the objection of interest did not apply, and never had applied, but the reason for exclusion was of another kind.

And besides, the legislature felt it necessary, it seems, to make some special provisions applicable to this part of the subject, for the sake of both parties; for though, where pecuniary interest of any and every kind was expressly to be discarded as an objection, there could be no danger that the party might be left to his own discretion as to tendering himself as a witness of his own case, or forbearing to do so; yet when the intention was also to enable parties to call upon their opponents to give evidence, there were other things to be thought of. A party, rather than be exposed to that test, might choose to absent himself, therefore that was to be guarded against on the one side; and on the other side, it seems to have been thought fair to give notice to the party of the intention of the opposite party to put him upon his oath, in order perhaps that he might look into his documents and accounts, and make all necessary inquiries and searches, and consider the privilege which it

might be proper for him to claim under that part of the clause which protects him from being compelled to give evidence that may expose him to prosecutions for penalties or criminal proceedings.

In the view taken by the Court of Chancery, the second clause contains in effect all that the statute provides respecting the admission of parties, and only renders each liable to be put on oath by the other, which, as I have already said, is a change unconnected with the former incapacity from interest, and would be no extension (so far as regarded the parties to a suit) of the former act in relieving against the objection to competency on the ground of interest.

I would gladly have taken the same view of the act, but, with much deference to the judgment of those who differ from me on this point, it does not appear to me that the operation of the second statute can be so confined consistently with its language, and with the scope and objects of the two statutes. It was assumed in *Fuller v. Richmond* (the case I have alluded to) that parties in suits have been hitherto excluded from being witnesses on grounds altogether independent of their interest. But I apprehend we cannot properly say this, for the instances are many in which defendants in a cause have been examined in favour of other defendants, when nothing having been proved against themselves, they have been acquitted on the same trial, or when they have allowed judgment to go by default; and all these cases do clearly proceed on the ground, that where they have no interest their merely being parties in the record is no objection to hearing their evidence. I refer to *Doe dem. Harrop v. Green*, 4 Esp. 198. And indeed, not only do the most approved treatises on the law of evidence place the exclusion of parties from being witnesses in their own behalf expressly and emphatically on account of their direct and pecuniary interest in the event, but adjudged cases by courts of the highest authority take the same ground. In *Worrall v. Jones*, 7 Bing. N. C. 399, Tindal, C. J., said, "No case has been cited, nor can any be found, in which a witness has been refused upon the objection in

the abstract that he was a party to the suit : on the contrary, many have been brought forward in which parties to the suit, who have suffered judgment by default, have been admitted as witnesses against their own interest ; and the only inquiry seems to have been in a majority of the cases, whether the party called was interested in the event or not, and the admission or rejection of the witness has depended on the result of this inquiry."

So also in *Pipe et al. v. Steele & Harvey*, in the Queen's Bench (2 Q. B. R. 733), Lord Denman observed that "the objection of being a party to the record had been deliberately over-ruled in *Worral v. Jones*, a case of great authority, in which the Lord Chief Justice Tindal gave the unanimous judgment of the Court of Common Pleas that a party to the record may be examined as a witness provided he be disinterested." The English statute, which excludes interest as a ground of objection even to the party in a cause, had not then been passed ; and, as the court perceived a clear pecuniary interest in that case they rejected the witness, but expressly on the ground of his interest, and not because he was a party to the record. Now I think, when we read the two statutes which have been passed here, we can have no doubt that the legislature did mean, that interest—by which I understand always to be meant pecuniary interest—in the event shall not hereafter be a ground of exclusion of any person in any case.

I do not think that we can found any contrary opinion on the idea that witness and party are terms so distinct that the legislature cannot have meant the word witness, under any possible circumstances to include party ; for it is a common expression which we find used in our books in discussion, whether a party may or may not be a witness in his own cause. There is no repugnancy in the term ; and it seems to me that the legislature have by their acts allowed it : I think, therefore, that in this case the defendant should have been admitted, and that we should grant a new trial without costs. (a)

(a) *Ward v. Haydon et al.*, 2 Esp. 552 ; *Stevens v. Lynch*, 2 Camp. 332 ; *Rex v. the inhabitants of Woburn*, 10 East. 395 ; *Norden et al. v. Williamson*, 1 Taunt 378.

DRAPER, J., (after referring to and commenting upon the statutes, and the various authorities mentioned in the note, (a) —The conclusion at which I arrive, therefore, from a consideration of these authorities is, that when the statute declared that no person offered as a witness should be excluded by reason of incapacity from interest from giving evidence, (but for the proviso,) it made parties to the suit competent witnesses though not compellable to be sworn; and therefore, when the proviso was repealed as to the parties to a suit, they became competent witnesses. For if the incompetency arose only from interest and the cases above referred to, appear incontrovertibly to establish that position, the moment that such reason for holding them to be incompetent was annulled, they became as competent to be offered as witnesses as any person not a party to the suit would be.

I confess that my first impression was so much the other way, from a recollection of the terms of the second section of our act, that I intimated my opinion at *Nisi Prius* on the last circuit (though it was unnecessary to rule the point) that a party to the suit was not a competent witness in his own behalf, though under the second section he was compellable to give evidence if called by the opposite party; and on a deliberate consideration of that section and of the former act, without the proviso, it seems to me clear that, assuming the law to be that it makes parties to the suit competent yet it would extend no further than to remove the objection which existed on the score of interest; and it contains no language under which such party could be compelled to give evidence against his will. Assuming the disqualification to be removed, there would be, but for the second section, a defect, a want of power to compel the party to give evidence against his own interest.

(a) Worrall v. Jones, 7 Bing. N. C. 399; Pipe et. al. v. Steel et. al., 2 Q. B. R. 833; Brown v. Brown et al., 4 Taunt. 752; Mant v. Mainwaring et al., 8 Taunt. 139; Morden et al. v. Williamson, 1 Taunt 378; Thorpe v. Barber et al., 5 C. B. 675; Barret v. Gore et al., 3 Atk. 401; King v. Baker, 2 A. & E. 333; Walker v. Giles, 6 C. B. 662; Blackett v. Wier, 5 B. & C. 385; Mash v. Smith et al., 1 C. & P. 577; Haddrick v. Heslop, 12 Q. B. 267, 284; Rex v. the Inhabitants of Woburn, 10 East. 403; Fenn dem. Pewtriss et al. v. Granger, 3 Camp. 177; Reg. v. the Inhabitants of Adderbury East, 5 Q. B. 195.

I have been struck with the language used in the second section of the British statute of last session, 14 & 15 Vic. ch. 99, which enacts that on the trial of any issue joined, &c., the parties thereto, and the persons in whose behalf any such suit, &c., may be brought or defended, shall, except as hereinafter excepted, be *competent* and compellable to give evidence on behalf of either or any of the parties to the said suit, &c. The use of the word "competent" seems to imply that the mere repeal of the proviso to the first act did not make parties to the suit competent. I will not say absolutely there is no possible way in which other objections than those merely of interest might be urged to the admissibility of the testimony of a party to the suit; but, if there were none, I am inclined to suppose the term "competent" to be rather introduced to exclude all possible doubt that he might be called by any other party, than to treat it as the sole *enabling* provision for the admission of his evidence on his own behalf. Mr. Taylor, in his Treatise on Evidence, treats the provision of the first section of 6 & 7 Vic. ch. 85, as "exceptions engrafted on the general rule that no interested witness shall be incompetent to give evidence;" and, if he be correct in this view, the repeal of the exception would of itself give universality to the rule, which is the conclusion at which I have arrived in the matter. (a)

Rule absolute.

ORSER V. CORNELIUS MOUNTENY AND JOSEPH MOUNTENY.

Ship Registry Act, 8 ch. Vic. 5, section 13, 16, 21—Necessity of compliance with, to effect a valid sale of shares.

Where an action was brought for breach of contract in refusing to sign certain promissory notes, the sale and delivery to the defendants of shares in a schooner being alleged as the consideration for the promise; and it appeared that the plaintiff had surrendered his interest to the defendants, and that they had continued in exclusive possession of the vessel; but that no assignment had been made as the statute directs, and no transfers indorsed on the registry, nor any new certificate of ownership granted, the court ordered a nonsuit.

But if the defendants had given their notes, they could not have resisted payment on the ground that they could not have received a valid title.

Assumpsit—1st count, on a special agreement, setting forth that on the 1st of September, 1849, in consideration

(a) See Stapleton v. Croft, 15 Jurist, 408.

that the plaintiff, at the request of the defendants, would sell and deliver to them $\frac{21\frac{1}{3}}{64}$ shares of the schooner Primrose at the price of 115*l.*, the defendants promised to pay for the same on the delivery thereof by three promissory notes (for certain sums, payable at certain times, as in the declaration mentioned): that the plaintiff, confiding in their promise, on the 3rd of September, 1849, sold and delivered to the defendants the said shares, but that the defendants have refused to make and deliver the notes according to their agreement.

In the 2nd count the plaintiff declared that on the 3rd of September, 1849, in consideration that the defendants were indebted to the plaintiff in a large sum—viz., 115*l.*—for goods sold and delivered by the plaintiff to the defendants, the defendants undertook and promised the plaintiff to make and deliver to him *on request* their promissory notes (as in the first count): that the plaintiff afterwards—viz., on the 4th of September, 1849,—requested the defendants to make such notes, but the defendants refused, &c.

In the 3rd count the plaintiff declared, that in consideration that the defendants were indebted to him in a large sum on *an account stated*, they promised to make and deliver the notes, and averred a subsequent request and refusal.

Common counts were added for goods sold and delivered, money received, and on an account stated.

Pleas—1. Non assumpsit.

2. To the first count—That the plaintiff did not sell or deliver to the defendants the said $\frac{21\frac{1}{3}}{64}$ shares of the said schooner, &c.

3. To the second count—That they were not indebted to the plaintiff in 115*l.*, or any part thereof, in manner and form, &c.

4. To the third count—a similar plea.

The facts proved at the trial were these:—On the 13th of August, 1847, James Spencer and John Stanton made the declaration required by our statute 8 Vic. ch. 5, sec. 2, that they were sole owners in equal proportions of the vessel called “The Primrose,” of the burthen of 29 tons, built at

Athol, in the county of Prince Edward, in 1844, being a decked schooner; and took out a certificate of ownership accordingly for $\frac{32}{64}$ shares each. On the back of this certificate of the collector at Picton there was written a memorandum of ownership being assumed in 1849, by Cornelius Mounteny and Joseph Mounteny, each $\frac{32}{64}$.

It was proved by *vivâ voce* testimony, that the shares in the vessel had, after the 13th of August, 1847, been owned by different persons, who had not, as it seems, taken any measures to have their interest registered; and for all that appears, the transfers were not made by writing.

One Hazard had in this way become actually possessed of two-thirds of the schooner, and the plaintiff Orser of the other one-third. These defendants, in 1848 or 1849, bought Hazard's two-thirds in the manner mentioned; and the plaintiff having sold out his one-third to one Waters, and the defendants wishing to purchase it, and thus become sole owners, they agreed with the plaintiff verbally to give him 500 dollars for his share, deducting 30 dollars on account of some claim they had. This agreement was made in the presence of witnesses, on board of the schooner, and while these defendants were in possession of, and Cornelius Mounteny was sailing her as master.

The plaintiff surrendered up to them verbally his interest and left them in possession of the vessel; and they were to call upon him the same evening and give their notes for the price, as stated in the declaration. This transaction took place on or about the 1st of September, 1849.

The defendants continued in exclusive possession of the vessel, and on the 15th of September, 1849, Cornelius Mounteny had her in the port of Picton, and upon the collector inquiring into the change of ownership which he had heard some report of, he stated that he and the other defendant were then the sole owners, having purchased out Hazard and the plaintiff.

The defendants, though they kept the schooner, failed to go, as they had promised, and give their notes; and, being asked by the plaintiff some time afterwards to do so, they excused themselves on account of the hardness of the times,

and made some objection which, in the apprehension of the witnesses was made in general terms, to the sufficiency of the bill of sale or writing which they spoke of as having been received by them from the plaintiff. They were asked by the plaintiff to get any one to draw a more regular one if they desired it, which he said he would execute at once. They did not deny that they bought the shares; and pointed out no specific defect in the writing, which they only spoke of, but did not produce. Their chief reason for not signing the notes, as they stated, was that the times were too hard for them to give their notes.

The plaintiff had given notice to the defendants to produce the assignment from Spencer & Stanton to Joseph Mounteny, William Hazard, and the plaintiff, and the bill of sale from the plaintiff and these defendants; but no transfers were produced on the trial. The defendants objected that there was no proof that the plaintiff owned the one-third, or any interest which he states himself to have sold to the defendants: and 2ndly, that there was no legal evidence to support his averment, which the defendants had traversed, that he had "sold and delivered" his shares to the defendants; for that there was no assignment from the plaintiff such as the statute requires, reciting the certificate of ownership—in fact, no assignment shewn at all, except by parol. These objections were reserved as grounds on which a nonsuit might be moved.

The jury found that there was a written bill of sale from the plaintiff in possession of the defendants, and gave their verdict for the amount of the notes and interest (129*l*.5*s*.7*d*.) which had been drawn, and tendered to the defendants for signature, but which, contrary to their undertaking, they refused to sign.

Patterson, for the defendants, moved to enter a non-suit on the points reserved at the trial, or for a new trial on the law and evidence, and for misdirection. He referred to 8 Vic. ch. 5, and cited *Marsh v. Robinson*, 4 Esp. 98; *Camden et al. v. Anderson*, 5 T. R. 709; *Tinkler et al. v. Walpole*, 14 East. 226; *Pirie et al. v. Anderson et al.*, 4 Taunt. 652; *Sherwood et al. v. Coleman*, 6 U. C. R. 614.

Fitzgerald, contra, cited *Hunter v. Parker et al.*, 7 M. & W. 322.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the defendants are entitled to have the rule made absolute for a non-suit.

If the defendants had given their notes when they got possession of the vessel, and had been sued upon them, they could not have resisted payment on the ground that they had not received a valid title; because, having the possession, and use of the vessel, and the enjoyment of the plaintiff's share in her, they could not set up that there was a total want of consideration, and must therefore have paid their notes. But here an action is brought against the defendants for not giving the notes, as on a special contract, and the sale of the vessel is averred as the consideration, which sale is distinctly traversed. Proof of the sale lay on the plaintiff, and although the jury might have been allowed to infer that a writing of some kind was given by the plaintiff, yet the evidence shewed clearly that the transfer had not been indorsed on the registry, and that there had not been a new registry either of the plaintiffs or defendants as owners of these shares. Stanton & Spencer were still the registered owners. The Ship Registry Act is too express to be got over. The cases which have arisen on similar provisions in the British statute shew that the plaintiff can not for any purpose set up a sale on such evidence only. I apprehend he may bring trover against the defendants, or claim to be still the owner of the shares, as the defendants have disaffirmed the sale to them.

Rule absolute for nonsuit. (*a*)

(*a*) *Rolleston et al. v. Hibbart et al.*, 3 T. R. 406.

HUGHES V. THE MUTUAL FIRE INSURANCE COMPANY OF
THE DISTRICT OF NEWCASTLE.

Debt on bond, conditioned to abide by the award of arbitrators.

The plaintiff insured his property with the defendants; upon its destruction by fire a dispute arose as to the loss, and the matter was referred to arbitration.

After the fire, but before the award, the plaintiff assigned the bond of submission, the policy of insurance, and the money due thereon, to one H. G. H.

Held, that the assent of the defendants to the assignment was not necessary.

Held also, that the assignment of the submission bond did not, under these circumstances, by vesting the interest in the assignee, affect the legality of the award made under it.

Held also, that the act abolishing districts (12 Vic. ch. 78) does not take away from the defendants the name given to them by their charter.

Semble, That the making of the award is not admitted by the pleadings in this case.

But *Held*, that it was sufficiently proved by shewing that the defendants had acted upon it by paying a portion of the sum awarded, and that their officer had stated in writing the particulars of the award, and the sum remaining due on it.

Debt on bond in penalty of 1250*l*.

Pleas—1. Bankruptcy of the plaintiff, and appointment of one Fowkes to be his assignee, who is thereby entitled to the said supposed debts, sums of money and cause of action in the declaration mentioned.

2. As to 232*l*. 19*s*. 5*d*., payment; which latter plea was specially demurred to, and the plaintiff had judgment on the demurrer.

The plaintiff replied to the plea of bankruptcy, that before his bankruptcy, and after the making of the bond, he, for the consideration of 400*l*. paid to him by one Henry George Hughes, assigned to him by deed the said bond and all the plaintiff's right to the same; that that the defendants had notice of this assignment before his bankruptcy, and that this action is brought for the benefit of Henry G. Hughes the assignee, who is alone interested therein, and that the assignee under the commission of bankruptcy has not claimed, and cannot claim any benefit from the cause of action in the declaration mentioned.

The defendant rejoined to this replication to the plea of the plaintiff's bankruptcy, that the assignment of this bond to Henry G. Hughes was made by the plaintiff in contemplation of bankruptcy, and for the purpose of giving him a preference over the other creditors, and was therefore void in law.

The plaintiff surrejoined to this, that the assignment to Henry G. Hughes was made on the 12th of March, 1846; that the commission of bankruptcy against the plaintiff issued on the 28th of July, 1846; that the assignment was made in good faith more than thirty days before the issuing of the commission, and without any notice to or knowledge by Henry G. Hughes of any prior act of bankruptcy; and he traversed specially the alleged fraud.

The plaintiff then set out the bond and condition, which was to abide by the award of arbitrators on a certain difference between the plaintiff and the defendants, respecting the plaintiff's claim on a policy of assurance on certain goods of his insured by the defendants which had been destroyed by fire; and averred an award made on the 23rd of March, 1846, that 570*l.* should be paid to the plaintiff for his loss; and suggested a breach in not paying the sum awarded.

The policy was granted by "The Mutual Fire Insurance Company of the Newcastle District," on the 13th of December, 1845. The fire occurred in the winter of 1846, and upon a dispute about the amount of loss, the plaintiff and the defendants, on the 4th of March, 1846, referred the matter to arbitration. No award was produced at the trial, but the deputy sheriff swore that, having in that spring several executions in his hands against the plaintiff, the award was given to him by one of the arbitrators by the plaintiff's direction, and that he gave it to Mr. Sidney Smith, his attorney, in order that he might receive the money from the defendants to be applied on account of the executions in the sheriff's hands. Mr. Smith was absent from Canada at the trial, and the deputy sheriff swore that he had searched at his office, and could not find it. A letter was put in from the secretary of the defendants, in which he spoke of the award, stated the amount awarded to be 570*l.*, and that the balance then unpaid upon it (29th June, 1846) was 337*l.* 0*s.* 5½*d.*, and the defendant relied upon this note, and the fact of part of the sum awarded having been paid, and also on the pleadings on the record, as being sufficient to establish the award.

A deed of the 12th of March, 1846, was put in, whereby the plaintiff assigned the policy to Henry G. Hughes. This was after the fire, but before the award made. On the same day the plaintiff executed an assignment under his seal of the bond of submission, and the policy of insurance, and the money due thereon, to Henry G. Hughes; and it was proved that on the 14th of April, 1846, a written notice of the assignment was sent to the company.

A commission of bankruptcy issued against the plaintiff on the 1st of June, 1846, which was afterwards superseded for irregularity. And another commission issued on the 28th of July, 1846, more than four months after the assignment of the policy.

It was proved that this assignment was made to secure the amount of a note of the plaintiff, payable to Henry G. Hughes, but the pleadings do not bring in question the fact of a good consideration for the assignment, but only whether it was given *bona fide* within the meaning of the bankrupt laws, or for the purpose of given a fraudulent preference.

Upon that point the evidence was very strong to shew that before, and at the time of making the assignment, the plaintiff was in embarrassed circumstances, and apprehending bankruptcy, though apparently anxious to avoid being made a bankrupt; that he had led the sheriff, who had executions against him, as well as various creditors, to expect that they would receive payment through his claim under the policy (the loss having occurred in January or February), yet that being much pressed, as it was sworn he was, to make the assignment to H. C. Hughes in order to secure a debt, he did so; that this assignment was taken through the intervention of a practising attorney, who strongly urged the plaintiff to make it, in order to secure a debt of about 200*l.*, and that it was then arranged that the plaintiff should receive the balance (170*l.*) on the award, and that amount was accordingly paid him—the intention being, that the residue should be received by H. G. Hughes, to whom the plaintiff was indebted for money borrowed, and should be paid over by H. G. Hughes to a creditor of his, Mr. Hall. The sheriff, it appeared, contended against

this assignment, and induced the company to pay over 200*l.* to him, to be applied on the executions, and indemnified them for doing so, so that he was in fact the defendant in this cause to that extent.

The learned Judge directed the jury, that it was of no consequence that the plaintiff was in embarrassed circumstances when he made the assignment, if it were not a voluntary act of his own, and if he were pressed to give the security; that if it was obtained at the solicitation of the creditor, and did not spring from the desire of the debtor to give a preference to one creditor in contemplation of bankruptcy, it would be good.

The jury gave their verdict for the plaintiff, for 524*l.*

Vankoughnet, Q. C., obtained a rule nisi for a new trial on the law and evidence, and for misdirection; or to arrest judgment, on the ground that there is no such corporation as the "Mutual Fire Insurance Company of the Newcastle District": that the benefit of an award against the defendants could not be assigned or made use of against them without their consent, which is not averred: and that the record does not shew an assignment made under such circumstances and at such time as to avoid the effect of the bankrupt laws. He cited *Anderson et al. v. Gamble*, 8 U. C. R. 437.

Cameron, Q. C., contra, cited *Slatterie v. Pooley*, 6 M. & W. 664; *Boileau v. Rutin*, 2 Exch. Rep. 665; *Hawkins v. The Municipal Council of Huron, &c.*, 2 U. C. C. P. 72; *Edmunds v. Grooves*, 2 M. & W. 642.

ROBINSON, C. J., delivered the judgment of the court.

We think that this case went to the jury with a proper direction. The pleadings left but the single issue for the jury to try, whether the assignment to H. G. Hughes was fraudulent or not, with reference to the bankrupt laws; and taking the facts to be as Mr. G. B. Hall represented them; it was not fraudulent; for he swore that he urged its being done, and Charles Hughes, according to his account, was not inclined to do it, but yielded to his solicitations.

There are some particulars in Mr. Hall's evidence which I cannot quite understand. He states the assignment to

have been asked for, and obtained by him by the direction of his father, to whom money was coming on a draft; but from which of the Hughes the money was due, and what amount remains due on account of it, to the witness's father, does not appear; nor is the reason explained why Charles Hughes should have met the draft; when due, or why the assignment should have been taken to Henry G. Hughes in order to secure that debt, rather than to the person to whom the debt was due, or his agent. I confess I do not find the evidence at all clear in this respect; but the pleadings do not raise any question on the sufficiency of a consideration for the assignment, but on the single ground that it was made in order to give a fraudulent preference to one creditor over the others, not questioning that the person to whom the assignment was made was a *bonâ fide* creditor, either on his own account, or as acting on behalf of another. I cannot make out on the evidence that there was such a sum to be covered in consequence of the transaction that he spoke of as would be at all equal in amount to the claim under the plea, or rather to the balance still due upon it, and for which the verdict has been given; and certainly no more should be withheld from the assignees of Charles Hughes the bankrupt, than whatever is still actually due of the debt which the assignment of the policy and the arbitration bond was intended to secure. The pleadings, however, do not open to us any question or difficulty of that kind. If this assignment is intended to be made use of for the recovery of a larger sum than remains due on account of the debt which it was given to secure, the assignees of the bankrupt must take their remedy, either by equity or by application for the equitable interposition of this court.

With respect to the exception taken, that the making of the award was not legally proved, we do not think that we could hold what the plaintiff contended for—that is, that the reference by the defendant to the award in the second plea dispensed with the necessity of the plaintiff's giving evidence of it when he came to prove the truth of his suggestion which followed the issue joined on the other plea, though perhaps on fuller consideration that might be

found correct, considering the nature and order of these pleadings.

But we are of opinion that there was no necessity for giving further evidence of the award than was given, when it was shewn that the defendants had recognized and acted upon it, paying a certain sum with express reference to the award and as part of the sum awarded, and had through their officer stated in writing the particulars of the award, and the sum remaining due by them upon it.

We see no difficulty arising from the late Territorial Division Act, which abolishes districts, for we find nothing in either of the statutes, 12 Vic. ch. 78 or 79, which should disable this corporation from continuing to use the name given to it in its charter, 6 Wm. IV. ch. 18, sec. 4. It is by that name it was incorporated, and there is nothing express or necessarily to be implied in any of the statutes, which compels, or, so far as I can see, warrants a change of the corporate name.

As to the objections, that the policy could not be assigned without the assent of the corporation, and that the assignment, made as it was, and as it is stated in the record to have been made, does not place the policy out of the control of the bankrupt laws, we see nothing to support them. We think the plaintiff entitled to succeed upon the evidence on the only issue to be tried, and we find nothing in the record that makes against the plaintiff's right of action.

It was argued by Mr. Vankoughnet, on the part of the defendants, that if the assignment was valid, then the interest was in the assignee, and the award could not legally be made afterwards upon a submission of Charles Hughes, the person assured; but the submission was entered into before the assignment, and was according to the act, and the assignee, whose title is no otherwise impeached than by a question raised on the bankrupt laws, took his assignment with a knowledge of the submission bond. The evident intention of the assignment was to substitute him for the assured as to all subsequent proceedings, taking the thing up as it then stood, with a reference already assented to, which the assignee thus ratified, and

which indeed he could not have avoided. We discharge the rule ; begging it, however, to be born in mind that our judgment is such as the evidence calls for in connection with these pleadings, and that we are not, by our judgment declaring our conviction that the plaintiff has shewn a claim in his own right to the full amount of the verdict ; or that the defendants might not, by taking another course, have restrained the amount of the verdict. It is unnecessary to determine that, in disposing of this rule.

Rule discharged.

CHURCH V. FOULDS.

The plaintiff contracted with one L. for the purchase of a lot of land, and paid down a part of the purchase money. The agreement between them contained these words : " It is understood that the said C. has now possession, full control, and enjoyment of the said premises from this time forward, and that if any person be now occupying the said premises the said C. is to have full control thereof in all respects the same as if occupied by original bargain with him ; also that said C. assumes said L.'s situation in respect thereto in full."

When this arrangement was made, one J. was living on the place by L.'s permission. The plaintiff went upon the land, and found several persons employed by the defendant in cutting timber there ; he info med them, and J. of his purchase, and forbade further trespasses. J. was also desired by him to go off the place, but refused. The defendant rested his defence upon J.'s right to sell him the timber, which was not sustained upon the evidence.

Held, that the plaintiff might maintain trespass against the defendant, or against J., for anything done illegally after his entry, if not for all that had been done after he had purchased.

Trespass for entering on lot 13, 8th con. Percy, and cutting down and taking away timber, trees, &c.

2nd count, for taking away the trees of the plaintiff.

Pleas—1. Not guilty.

2. To 1st count—the close not the plaintiff's.

3. To 2nd count—that the trees were not the plaintiffs.

4. To 1st count—that one Lawrence was seized in fee of the close, by whose leave he committed the trespass, &c., giving color to the plaintiff. To this last plea the plaintiff replied *de injuriâ*.

At the trial, before Robinson, C. J., at Cobourg, it appeared that this lot of land, and another adjoining it, belonged to one Lawrence ; and the plaintiff produced and proved a written agreement between himself and Lawrence, made on the 25th of November, 1850, in Onieda County, in

the state of New York, whereby Lawrence agreed to sell him lots 13 and 14, in the 8th concession of Percy, "*or his, Lawrence's, interest therein,*" for 726 dollars, of which 145 dollars were paid by the plaintiff at the time, and the remainder was made payable in four instalments with interest.

This agreement contained these words "It is understood that the said Church has now the possession, and full control, and enjoyment of the said premises, from this time forward subject to the provisions thereof, (that is to his making the payments), and that if any person be now occupying the said premises, the said Church is to have full control thereof in all respects, the same as if occupied by original bargain with him; also that the said Church assumes said Lawrence's situation in respect thereto in full: and that if Church should fail to perform any of the conditions of the said contract on his part, then Lawrence may declare the contract void, and may re-enter and repossess himself of said premises, by ejectment or otherwise, without defence by Church or his assigns." This agreement was under the seals of the parties.

It was proved, that in the following month, Church having made this agreement, and hearing that people were cutting timber on the land, went upon it with a witness, and they found one Henderson and several persons so employed, and working, as it afterwards appeared, for the defendant. The plaintiff told them he had bought the land, and forbad them from trespassing; they referred him to one Judge, who was living on the land, and the plaintiff went to Judge, and informed him of his purchase, and desired him to go off the place. Judge reproached the plaintiff with having acted treacherously in making the purchase, and denying that Church had in fact bought it: he refused to go out.

The plaintiff summoned Henderson before a justice, to answer for cutting the timber; the defendant in this action, Foulds, was present at the hearing of the complaint, and admitted that it was he who had set Henderson and the others to work. He said he had bought the timber on the lot from

Judge ; that he could not himself tell whether the title of Lawrence to the land was good ; but that if it was, then he would maintain that he had a right to buy the timber from Judge as he had done. He asserted that Judge had made some agreement with Lawrence, before the plaintiff's contract with Lawrence was entered into, and in proof of it he produced some letters which had passed between Lawrence and Judge. The defendant rested his claim on Judge's right to sell the timber to him, and he produced letters of Lawrence in proof of Judge's authority.

Lawrence was himself called at the trial of this cause, and he swore that the year before he sold to the plaintiff, Judge, who was then entirely a stranger to him, came to him in the United States, and wished to buy this lot from him ; that he thought Judge's offer too low, and refused it, upon which Judge went away, but some weeks after this Judge wrote to him about it from Canada, and that he replied by letter to the effect that he would not except his offer till he could himself come to Canada and see about the land ; but that if Judge chose he might go on the land, but that he was not to sell the timber, nor cut any except for the purpose of clearing ; and that if the witness determined not to sell to him, he would pay him for any clearing he should make, or would let him live on the land until he settled with him. Judge wanted to buy 100 acres only, and Lawrence swore that he knew there was a mill site on the 400 acres, and as Judge did not want the whole, he declined to sell him a part until he first ascertained where the mill site was. He swore further, that after this, and before the plaintiff came to him he had ascertained that Judge was a man without means of making payment, and had resolved not to sell to him ; that the plaintiff paid him 145 dollars down, and that he stipulated that the plaintiff should satisfy Judge for his clearing. Judge's application to Lawrence was made about a year before the witness made the sale to the plaintiff.

It was proved that the timber cut down by the defendant was worth 98 $\frac{1}{2}$., and it was almost all cut after the plaintiff went on the land, and informed the people of his title, and forbad their trespassing.

Judge was also called as a witness, and he represented that Lawrence, when he told him he might go into possession, not only allowed him to make improvements, but agreed also that that he might sell any of the timber that he chose, and if the bargain fell through, he was then to pay over to Lawrence the money he had received for such timber ;—that he had cleared a good deal and had a crop in the ground, when the plaintiff came and wished to buy all the timber on the lot ; but not calling afterwards to complete the transaction, he sold the standing timber to the defendant for 45*l*. He admitted on his cross examination, that he had written to Lawrence and had received answers, which answers he said he had given to Foulds. It was objected that the plaintiff could not examine as to the contents of these letters, because he had not given notice to Foulds to produce them, to which it was answered that the plaintiff had no reason for supposing that they were then in the defendant's possession, as they were documents belonging to Judge, and that he was therefore not bound to give him notice ;—and, as the defendant's counsel had, in his address to the jury, spoken of these letters and their contents, as if they fully justified what Judge contended for, and as if he had them in his power to produce, the Chief Justice allowed the witness, on his cross examination, to state their contents. He swore that Lawrence wrote to him that he must not let any one *take the land*, but said nothing about the timber, but that when he went to him in the State of New York, he told him he might sell the timber ; though he admitted that he was quite a stranger to Lawrence, and that he had only offered to pay for the land in trade, which offer Lawrence, he said, had agreed to.

Lawrence most positively denied that he had ever given any right to Judge to dispose of timber, and declared that he wrote to him only to the effect that he might clear land, and if he should not sell to him he would pay him for his trouble. He swore that he forbade him from cutting any timber for sale.

It was objected that, looking on the plaintiff as a bargainee of the land, he could not bring trespass before entry;

and that the plaintiff had at the time only contracted to buy and had not actual possession. On the other hand it was contended, that as the plaintiff had entered and asserted his right, and forbad the defendant and his servants from cutting timber, that would give him a right to maintain trespass for all that was done afterwards, although his right was denied. The question was, how the evidence would apply to the pleas denying the plaintiff's property in the close and in the goods.

At the conclusion of the case the learned Chief Justice told the jury, that it was for them to determine whether they believed the account of Judge, or of Lawrence ;—that the statement of the latter seemed in its nature more probable than the other, and that it had an unfavourable appearance for the defendant that he did not produce Lawrence's letters to Judge, on which his authority to sell the timber had been attempted to be supported before the magistrate ;—that if they did not believe that Lawrence had sold the timber to Judge, or had allowed him by letters to take it (and he positively swore he had not), then they should find for the plaintiff, because he had entered before the trespass, and had asserted his title, and Judge was only in on a temporary arrangement or understanding, revocable at any time, and not on an absolute contract of purchase, and Lawrence had since sold to the plaintiff, as, according to his account, he was at liberty to do.

The jury, on this evidence and direction, gave a verdict for 80*l*.

Vankoughnet, Q. C., obtained a rule nisi for a new trial on the law and evidence, and for misdirection, or that a verdict should be entered for the defendant on the plea denying possession in the plaintiff. He cited *Doe Baker v. Combes*, 19 L. J. C. P. 306 ; *Com. dig.*, Trespass B. 3 ; *Wheeler v. Montefiore et al.*, 2 Q. B. R. 133 ; *Mires v. Solebay*, 2 Mod. 243 ; *Thomas v. Phillips*, 7 C. & P. 573 ; *Davis v. Danks*, 3 Exch. R. 435.

Cameron, Q. C., shewed cause, and cited *Bulwer v. Bulwer*, 2 B. & Al. 470 ; *Butcher v. Butcher*, 7 B. & C. 399 ; *Newton et al. v. Harland et al.*, 1 M. & G. 644 ; *Gordon v. Harper*, 7 T. R. 9 ; 1 Saund. 322 b., 2 do. 476.

ROBINSON, C. J., delivered the judgment of the court.

We think that the plaintiff was entitled to succeed on the issues upon the pleas denying that the close and the trees were the plaintiff's. As between the plaintiff and Lawrence, no doubt the fee is in Lawrence; but the plaintiff, having contracted to purchase from him, and paid a large portion of the price, and not having forfeited his contract under which the right of possession is expressly given to him, he would, beyond all question, be in a situation, if under such circumstances he were living on the place in peaceable possession, to sue in trespass for any injury of this kind committed by a wrong-doer; and such wrong-doer could not obstruct his right to recover by setting up the dry legal estate in Lawrence, while the plaintiff was in possession as equitable owner, and with the assent of Lawrence, receiving the profits to his own use, and not as tenant to Lawrence. Then, here it is true, that the plaintiff was not actually living on the place and occupying it peaceably as owner when the defendant, in defiance of him, cut these trees, for Judge lived on the land—that is, he persisted in doing so, although he knew that he was not accepted as a purchaser, and that the plaintiff was; and he did not offer to go out if he were paid for his clearing, nor maintain his right to remain, or to sell the timber on any such ground.

When the plaintiff entered, informed him of his purchase claimed right to the possession, and forbad further trespasses, he placed himself in that situation that he could maintain trespass even against Judge himself, for anything done after that, if not for all that had been done illegally after he had made his purchase. The case of *Butcher v. Butcher*, which was cited by Mr. *Cameron* in the argument, establishes that, as we think, clearly, and so also do the cases of *Taunton v. Costar*, 7 T. R. 431, and *Hey v. Moorhouse et al.*, 6 Bing. N. C. 56.

It is complained, however, that the amount of damages given by the jury is altogether too high; that it was the estimated value of the timber as it lay in its prepared state, whereas there was no evidence that it had ever been removed from the land, but it may yet be lying there and be

at the disposal of the plaintiff. I conceive, however, that the witnesses who spoke of the value of the trees estimated them as standing timber, and certainly not by their price per foot as marketable lumber—in which case I am persuaded the estimate would have been much higher. It may be that the valuation is high, but we should find it difficult to relieve on that ground, for we must now assume that the jury believed Lawrence, and disbelieved Judge, whose account that he was allowed by Lawrence to make market of all the timber he pleased, and was only cautioned to let no one take the land, seemed, I confess, most absurd. From the manner in which he gave his evidence, as well as the nature of his testimony, and from his not producing Lawrence's letters—on which he had professed to found his claim—nor accounting for not producing them, there is every reason to conclude that he was acting disingenuously, and taking an unfair advantage of the owner of the land in stripping it of its timber for sale, when he had little reason to believe that he would be accepted as a purchaser. Foulds rested his defence on Judge's right; he was fairly warned, and would not desist; but chose to go on in disregard of the plaintiff's right, and of course he did so at his peril. It is trespass, not trover, that is brought here; the land is rendered so much less valuable to the plaintiff who has bought it, and it is into his pocket the damages should go, not that of his vendor. Lawrence, indeed, lays no claim to them, but appears as a witness to support the action of his vendee. There are some cases in which either one of two parties is in a position to recover damages for injuries done to property, but whoever sues first will, in that case, prevent the other from recovering also, for there can be no double satisfaction; and it is of no consequence to the defendant which he is made to pay.

It appears to us that the only question in this case is, whether the damages are so obviously and greatly excessive that we should interpose on that account, considering, as we must, all the circumstances; and we think we ought not to interfere on that ground.

Rule discharged.

HILARY TERM, 15 VIC.

Present—THE HON. JOHN BEVERLY ROBINSON, C. J.

“ THE HON. WILLIAM DRAPER, J.

“ THE HON. ROBERT EASTON BURNS, J.

CASTLE V. ROHAN.

R. leased to C. certain premises for eight years. C. covenanted that he would, at his own charge, place the land and premises in good order; that he would build a new stable, &c.; and would repair and keep repaired the fences and gates then erected, or that might be erected during the term: on account of these improvements and additions it was agreed that no rent should be paid for the first nine months.

Held, that the lessee was not obliged to perform his covenant within the time for which he was relieved from rent.

And *Quære*, whether he should have the whole term to do the work, or must be held to have agreed to do it within a reasonable time.

Trespass—1st count, *quare clausum fregit*, describing the close as the north half of 12, in the 8th concession of the Gore of Toronto.

2nd count. Trespass in breaking and entering a dwelling house of the plaintiff, situate in the said close, and expelling the plaintiff and his family.

3rd count. Taking goods of the plaintiff: grain, manure, wood, wearing apparel, and farming utensils.

The defendant pleaded—1. As to all of the first count, except the breaking and entering, and to the trespasses in the third count, not guilty.

2. As to the entry in the first count, *liberum tenementum*.

3. To to the second count, *liberum tenementum*.

4. As to the breaking and entry in the first count charged, the defendant set out a demise from him to the plaintiff before the trespass—viz., on the 27th day of April, 1849—for eight years, at 45*l.* a year rent: that the plaintiff entered and was possessed under the demise. The demise was afterwards set out on oyer, and the pleadings presented several questions on the effect of its provisions, which, without specifying the several pleas, may be shortly stated.

The lease was made by the defendant to the plaintiff on the 27th of April, 1849, and by it the defendant leased to the plaintiff sixty acres of cleared land, and a dwelling

house thereon, barns, stables, and other out-houses thereon being, for eight years from the date, paying during the term the yearly rent of fifteen shillings per acre, or 45*l.*, by half yearly instalments on the 27th of April and the 27th of October in each year “without deduction or abatement on any account or pretence whatever, except the payment of such sum or any part thereof, on account of rent or otherwise, for nine months from the date: said nine months to be given free of payment of any sort to the said Castle, on account of *work and buildings therein after specified to be done* and built by the said Castle—the remaining quarter of the first year to be paid at the rate aforesaid on the 27th of April ensuing the date;—with clause of re-entry in case any part of the rent should be in arrear twenty-one days, or in case of the plaintiff underletting without the defendant’s assent.

The plaintiff covenanted for the due payment of the said rent of 45*l.*, and that he would at his own charge well and sufficiently place the said land and premises in good order and condition, and build a new stable thereon 20 × 16 feet, with floor, and stalls, and necessary fixtures; and build a brick chimney to the house then on the premises, with lime and sand; and make certain other improvements and additions specified in the lease; and also place the barn in good repair, (specifying also certain things to be done to it); and would repair and keep repaired the fences and gates then erected, or that might be erected during the term:

That he would cultivate the farm in a proper manner, and not dispose of more than two and a-half tons of hay in each year:

And would, at the end of the term, yield up the premises in good repair (wear and tear, and certain casualties excepted); and would, before leaving the same, have the land well fenced into six equal fields: with proviso, that if the 45*l.* rent reserved or any part thereof, should be in arrear twenty-one days, being lawfully demanded; or if any of the covenants of the plaintiff should be unperformed, then the defendant might enter and re-possess the premises, and remove the plaintiff.

And the defendant pleaded, that after the plaintiff entered, *though a reasonable time elapsed*, the plaintiff would not place the barn in good repair (specifying what the lease required him in that respect to do); and did not, nor would repair the fences and gates erected in the close, although the defendant—viz., on the 1st of October, 1850—requested him to do so; wherefore the defendant in pursuance of the covenant of the plaintiff and the powers reserved to him by the lease, entered upon the close, and took possession thereof, as he lawfully might, &c., which are the same trespasses, &c.

He also justified entering and taking possession on account of non-payment of 22*l.* 10*s.*, a half year's rent due on the 27th of October, 1850, after demand made, and expiration of twenty-one days.

The plaintiff answered, that a reasonable time for placing the barn, fences, and gates in repair, as in the defendant's rejoinder mentioned, had not elapsed, &c.

And that before the defendant entered, he had paid him the 22*l.* 10*s.*—viz., on the 13th of November, 1850—due for rent claimed by the defendant.

At the trial before Sullivan, J., at Toronto, it appeared that in December, 1850, the defendant entered into the dwelling-house, which the plaintiff had left fastened, and with a chair or two, and a table in it, and gave possession to a third party: no stable being then built, nor such a floor laid in the barn as the lease called for; and the work to the house not being done, some parts not at all, and others in a different manner from that stipulated for; and the fences being out of repair. The plaintiff had then been eighteen months in possession, and had left the place to go and live with his father, leaving no cattle on it, but a few acres of wheat in the ground. Some of the witnesses stated, as to reasonable time, that they thought the plaintiff could hardly by his own labour, while working the place, have done all that he had engaged to do before the time that the defendant entered; but that no doubt he might by hiring persons to do it, and probably by expending the nine months' rent which he had been allowed on account of the work. The

rent was proved to have been paid on the 13th of November, 1850, after distress, but within the twenty-one days.

The learned judge inclined to the opinion, that the plaintiff was bound to do the work within the nine months, as if the plaintiff had covenanted to erect the building and do the repairs in consideration of a sum of money to be paid on a certain day, not being an impossible day ; or as if the defendant had agreed to pay a sum of money to the plaintiff by a certain day in consideration of buildings to be erected—no time for completing the buildings being specified.

He held, therefore, that as to the entry and eviction the plaintiff was not entitled to recover as the defendant's entry was lawful and the plea of *non est factum* not supported : the condition being in effect such as the defendant had stated in his plea, although not so expressed in words in the lease.

But as to the third count for taking the goods he considered the plaintiff entitled to recover, because it was proved that there were some trifling articles in the house when he entered ; and there were no pleas to that count but *not guilty*,—and that the goods were not the plaintiff's.

The defendant's counsel objected to this because no such cause of action had been opened to the jury

It was settled that on this direction a verdict should be given for the defendant on the issue of *non est factum* ; and on the issues as to reasonable time having elapsed for doing the work ; and for the plaintiff on the third count, with 10s. damages.

Bell, for the plaintiff, obtained a rule nisi for a new trial on the law and evidence, and for misdirection. He cited *Sir Francis Burdett v. Withers*, 7 A. & E. 136 ; *S. C.* 2 N. & P. 122 ; *Payne v. Haine*, 16 M. & W. 541 ; *Platt on Covenants*, sec. 3 P. P. 40-58.

Cameron, Q. C., contra, cited *Wood v. the Copper Miners' Co.*, 7 C. B. 906 ; *Pordage v. Cole*, 1 Saund : 319 l. ; *Platt on Leases*, vol. ii. 103, 197 ; *Doe dem. Pitman v. Sutton et al.*, 9 C. & P. 706.

The question was whether the lease produced supported the defendant's plea, which was, that by the lease the plaintiff covenanted with the defendant that he would, *by the 27th January, 1850* (that is, by the end of the first nine months of the term), build the new stable, and put up the new chimney in the house, and do the repairs to the barn : or whether the plaintiff had not by the lease a discretion to do these things at his convenience during the term, though the first nine months' rent was to be allowed for on account of them—no time being specified in the lease within which any of the work was to be done.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the stipulation that the repairs and additions spoken of were to be allowed for to the lessee on account of the first nine months' rent, has not the effect of binding the lessee to make the repairs in that time, and so that the agreement is not correctly set forth when it is averred that the lessee bound himself to have the work completed by the 27th of January. As to the repair of gates and fences, it would be repugnant to give it that construction, because the whole of the cleared land was to be fenced by the end of the term in a totally different manner ; and surely the lessee might be allowed to content himself in the meantime with going to as little expense as possible with the fences. While he had the enjoyment of the place, the insufficiency of the fences to keep the cattle out could concern himself only, and at all events not the lessor ; and as to what was to be done to the house, and the building a new stable, and repairing the barn, the longer these were deferred the more valuable they would be to the lessor when delivered up at the end of the term. It was reasonable that the lessee should ask to be allowed to deduct out of the earliest rent, because that would the better enable him to do the work early ; and the earlier he did it the better for himself ; and he might well insist that the farm without a habitable dwelling house, no stable, a barn without a floor, and the fences out of repair, was not worth 45*l.* a year, if he was to pay that rent from the first ; and if the lessor admitted that he ought himself to be at the expense of the

repairs and additions, it would seem fair that he should be allowed to stop the value of the requisite repairs from the first rent, because he would then have either the farm in a proper state, or an equivalent in being relieved from the rent; but if such a stipulation for his benefit must draw after it as a consequence an obligation to do the whole work within the nine months, it might prove an inconvenience and disadvantage, rather than a benefit.

Whether the lessee should have the whole term to do the work, or must be held to have agreed to do it in a reasonable time (no time being mentioned), is a nice question.

The case in *Dyer* 33 a. 10, is clearly not in point, because there the lessee had to repair the bank of a river, and if he delayed to do so after a breach, the greatest mischief might follow. That is a peculiar case. Here the stable and the barn floor would be of as much worth to the lessor, and more, if built in the last year of the term, than if constructed in the first nine months.

We have found no authority for holding, that upon an agreement like this the tenant must have all his repairs and additions done within the period of the rent accruing which his landlord is to allow him to retain on account of the repairs; and as the case went to the jury with an expression of the learned judge that in his view of the case no greater latitude was allowed, we think there should be a new trial without costs.

As to the verdict of 10s. given for taking the goods in the house—whether that was proper or not, is not now in question, for the plaintiff only has moved against the verdict, and that part of it is not complained of; but I do not see that the plaintiff should have been allowed to succeed as regarded the goods; for, independently of his not going for that trespass at the trial, there was no evidence that the defendant had meddled in any way with the trifling things which the plaintiff had left in the house. He could not help the plaintiff having left them there; and if he had a right, as the jury found he had, to resume possession of the

house, I do not see that he was shewn to have committed any trespass in regard to the things left in the house.

Rule absolute.(a)

LOSSING V. JENNINGS.

The defendant, a bailiff of a division court, having an execution against J. L., went to him and seized a yoke of oxen, which he allowed him to retain for the time on receiving an acknowledgment of the levy indorsed on the writ. J. L. absconded, leaving the oxen with the plaintiff. The defendant took them away; whereupon she brought trespass, alleging that she had received them from J. L., on the day of his departure, in payment of a debt.

Held, that under a plea denying the plaintiff's property it was competent for the defendant to give in evidence the execution and seizure under it.

Held also, that by the acknowledgment given, the debtor had put it out of his power to transfer the goods seized.

Trespass for taking a yoke of oxen belonging to the plaintiff.

Pleas—1. Not guilty.

2. That the goods were not the goods of the plaintiff.

The defendant was a bailiff of a division court, and had several executions, at the suit of different plaintiffs, against the goods of John Lossing, (who was a son of the plaintiff, Lydia Lossing,) amounting in all to more than 20*l*. On the 14th of May last he went with these executions to levy on John Lossing's property, and found him employed on a job of road making, having these oxen and a horse in his possession; he acquainted him with his business, and seized the property, and took, on the back of an execution for 8*l*. at the suit of one Treffny, an acknowledgment of the levy being made, signed by John Lossing; and the bailiff thereupon left the oxen in John Lossing's possession until they should be required to be sold. On the 19th of May, John Lossing absconded, having first taken the oxen to the plaintiff's, his mother's, and left them there, and then he drove away with the horse.

The bailiff, finding he had absconded, traced the property to his mother's, and she then claimed the oxen as hers, declaring that the horse had belonged to her, and that her son had brought them to her on the same day he absconded

(a) See *Luxmore v. Robson et al.*, 1 B. & Al. 584.

and gave them to her in payment for the horse which she said she had sold him.

The defendant informed her of his having levied upon them on the 14th of May (five days before), and took them away—which was the trespass complained of. There was no proof of any sale by John Lossing to his mother of the oxen; nothing but that when he was actually flying from the province he left them with her, or sent them to her: but the learned judge considered that the defendant could not give evidence of the warrant upon the issues joined, and so excluded that from the jury's consideration, though he directed for the defendant on the ground that the plaintiff had shewn no right to the oxen.

The jury found for the plaintiff and 15*l.* damages.

Hagarty, Q. C., obtained a rule nisi for a new trial for misdirection, and rejection of legal evidence, or on the law and evidence, and on affidavits; against which

Read shewed cause, and cited *Samuel v. Sir J. Duke et al.*, 3 M. & W. 622; *Manders et al. v. Sir James Williams*, 4 Exch. Rep. 339.

ROBINSON, C. J., delivered the judgment of the court.

The defendant insists that having seized the oxen they were in his possession—*i. e.* in custody of the law—bound by the writ if he had even not levied, but clearly bound by the levy; and that his defence therefore was admissible under the plea denying the plaintiff's property in the goods. The only affidavit in opposition to the rule is one made by the plaintiff herself, not by any means satisfactory, and quite opposed to the evidence given on the trial. We could not give much weight to it.

The questions are—1. Whether the execution and proof of seizure under it should not have been admitted? in which case clearly the defendant should have a new trial.

2. If not so, whether there should not be a new trial on the ground that it appeared the goods really were John Lossing's, and no proof that the plaintiff had any interest in them?

We are of opinion that the defendant was entitled to a verdict upon the evidence and pleadings, and that there

should be a new trial without costs, the direction to the jury being in favour of the defendant.

The bailiff had seized the oxen while in the possession of the plaintiff's son, who owned them, and against whose goods he had an execution. The indorsement on the writ, signed by John Lossing, was an acknowledgment that the bailiff had seized, and we can put no other construction upon that, than that it was intended to be an assurance to the bailiff, that if he was allowed to keep the oxen in his possession while he was working with them they should be forthcoming when required for sale, unless he should in the meantime settle the debt. While the debtor held them under those circumstances, and on those terms, he had it not in his power to transfer them to another, and thereby defeat the special property in them which the bailiff had acquired by the seizure; and if he could have done so, there was really no evidence that he had done so. He was only proved to have taken them to her, and left them in her possession when he departed from the province. Under those circumstances the bailiff could be no more a trespasser, in taking the oxen from the person with whom Lossing had left them, than he would have been in taking them from Lossing himself. The inference of ownership in the plaintiff from the mere fact of possession did not lie in this case, because we see what the facts were; and that the plaintiff could have no right to hold the property against the defendant, because, for all that appeared, she stood in no other situation than as the mere agent of the debtor.

The question seems to resolve itself into this, whether the lien on the property which the defendant had acquired by the seizure must be specially pleaded in trespass; and we think it clear on authority that it need not be. Lossing had no right to the possession of these goods as against the officer who had seized; and the plaintiff, on the evidence, had no better right. The bailiff, in this case, is not in the situation of a mere wrong doer.

Rule absolute for a new trial without costs (a).

(a) See Elliott v. Kemp, 7 M. & W. 312

TWYNAM V. BINGHAM.

Assumpsit—1st count on a promissory note for 93*l*. 2nd count on an account stated.

3rd plea to first count: Setting up the defence of usury; and averring that it was corruptly, &c., agreed between the defendant and one A. B. that A. B. should lend to the defendant 200*l*., and that the defendant should pay therefor the sum of 21*l*. yearly interest: that A. B. should convey to the defendant certain land in O., *for the pretended price of 150*l*.* and take a mortgage of certain other land for 350*l*. with legal interest thereon; and that on a certain day named the defendant should pay to A. B. 200*l*. and reconvey the land in O. in full satisfaction of the mortgage: that this agreement was carried out; and that the note sued upon was given to the defendant as agent for the assignees of the estate of A. B. for 84*l*., being interest due on the 350*l*. in the mortgage mentioned.

Held, on demurrer, that the plea was sufficient, and that the facts stated shewed clearly a case of usury.

The 5th plea to the second count set out the same agreement, but did not aver that the account was stated of the interest due on the mortgage, or shew that the plaintiff was in any way connected with the usurious contract, and for these objections it was held bad.

Assumpsit on a promissory note for 93*l*. made by the defendant payable to the plaintiff, with a second count on an account stated.

3rd plea, to the first count. That before the making of the said promissory note—to wit on the 26th of July, 1845—it was corruptly, and against the form of the statute, &c., agreed between one A. B., and the defendant, that the said A. B. should lend to the defendant 200*l*. until the 26th of July, 1855, and that the defendant should pay for the same the sum of 21*l*. in each year; and that for the securing the repayment of the said sum of 200*l*. so to be advanced, together with the 21*l*. to be paid annually as aforesaid, the said A. B. should convey to the defendant a certain lot of land in the township of Orillia, “at or for the pretended price or sum of one hundred and fifty pounds;” and that the defendant should convey to the said A. B. certain other lots of land in the town of Barrie, subject to redemption upon payment by the defendant to the said A. B. of the sum of 350*l*. on the 26th of July, 1855, with interest thereon, at the rate of six per cent. per annum, on the 26th of July in each year; and that on the 26th of July, 1855, the defendant should pay to A. B. 200*l*., and should reconvey to him the said lot in Orillia in full satisfaction of the mortgage agreed to be made as aforesaid: that in pursuance of such agree-

ment he conveyed to A. B. the said lots in Barrie, subject to redemption as aforesaid, and that A. B. advanced to him the 200*l.*: and that the said note was made by the defendant and delivered to the plaintiff as agent, for certain persons *assignees of the estate of A. B. for the sum of 84*l.**, the interest due upon the said sum of 350*l.* in the mortgage mentioned.

In the 5th plea to the second count the same agreement was set out, and it was averred that "the money in the said second count mentioned is parcel of the money in the said mortgage mentioned."

Demurrer to the 3rd plea—Because the transaction stated is not usurious, and it is not averred that either the assignees or the plaintiff ever had notice of the alleged usurious contract, or that the plaintiff is not a holder for value; and because it gives no answer as to 9*l.*, parcel of the money mentioned in the note.

And to the 5th plea—Because the transaction therein stated is not usurious, and it is not averred that the plaintiff ever had notice of the alleged usurious agreement; and because the said plea is nonsensical and absurd as applied to the second count.

Gwynne, with whom was *Dalton*, for the demurrer, cited *Cuthbert et al. v. Haley*, 8 T. R. 390; *Davis v. Hardacre*, 2 Camp. 375; *Coombe v. Miles*, do. 553.

Roaf, contra, cited *Harrison v. Hannel*, 1 Marshall, 349.

ROBINSON, C. J., delivered the judgment of the court.

The defendant sets up the defence of usury, not alleging that it occurred in any transaction with which this plaintiff had anything to do, but in a transaction between the defendant and one Abraham Bettridge, out of which this note, according to the statement in the plea, has arisen; and he pleads further, that this note was made by the defendant, and delivered to the plaintiff as agent for certain persons, assignees of the estate of the said Abraham Bettridge. The statement, we think, gives us sufficiently to understand that the note was given for a sum of money including a large amount of usurious interest, and that it is now attempted to be recovered by the agent of the estate of Bettridge, a party to the usurious contract. Whether

the assignees of the estate of Bettridge are assignees for his benefit or the benefit of his creditors, in either case this security could not be enforced, if it was really given either wholly or in part to secure usurious interest. In what particular sense the term "assignees" is used we cannot tell, but if we were to suppose that it meant simply the purchasers for their own benefit of all Bettridge's effects, that intendment would not help the plaintiff's case, for a person making a purchase of debts in that manner, so far as he could be said in law to be an assignee of them, would not be placed in a situation entitling him to the privilege given to *bond fide* indorsees of negotiable notes by 7 Wm. IV. ch. 5.

Then, as to this transaction being usurious: we can of course only take the facts to have been as the plea describes them. Whatever they may really have been, we cannot look out of the record. According to the statement given there, it is as plain a case of usury as can be imagined. A man desiring to borrow 200*l.* is told he can only have it by paying 21*l.* a year for it, which is the interest on 350*l.* instead of 200*l.*; and that, in order to cover the usury and give the transaction a good appearance, he must take a deed of land valued between them at 150*l.* at the same time that he takes the money; and then, standing apparently as debtor to the other both for the 200*l.* lent and for the purchase money of the land, he is to give a mortgage for 350*l.*, the amount of the real debt and of the supposed debt, payable in ten years, with interest payable annually: but that when the time comes for paying the 350*l.* he is to be allowed to re-convey the land and repay the 200*l.*, and then he will stand fully acquitted. Such transactions may be common, with a view to the evasion of the statute against usury; but those who venture upon them should know that there is no shift or contrivance that the ingenuity of man can devise for covering usury which has any chance of succeeding where that intention is plain. It may be argued that, for all we or other people can tell, the land and the loan may have had no reference to each other; and the defendant in this case may have had occasion, quite

apart from the loan, for the use of the land, and may have acquired it *bonâ fide* for that purpose ; and that 9*l.* a year of the 21*l.* may have been nothing but a real compensation for the use of the land which the defendant was to enjoy. But the answer to that is, that the plea affirms the transaction to have been of another character. It says that the price was a pretended price, and that the 21*l.* was corruptly and against the statute agreed to be paid for the use of the 200*l.* alone. That is what the plea asserts, and what the defendant must have satisfied the jury of, if the plaintiff had taken issue upon it instead of demurring. There is no foundation for the argument that the price or value of the land was put in hazard because of there being no binding agreement on the defendant's part to re-convey, and that on that account there is no usury. That would be a strange application of the principle referred to, which can only come in question in those cases where money is lent upon terms which, from the nature of the stipulation, may on a certain event exempt the borrower from returning the principal. There was no such hazard here—the mortgage secured the whole 350*l.*, though part of it was only based on a fictitious transaction ; and if the defendant should fail to re-convey the land, the plaintiff could insist on the mortgage being paid up in full. It is true he was subject always to the risk of the mortgage being wholly invalidated on the the ground of usury, but that is not the kind of hazard which is to take a case out of the statute. If it were, there could be no case within it.

The case of Cuthbert et al. v. Haley, 8 T. R. 390, has obviously no application to the facts of the present case. There a certain person who had received usurious interest in discounting certain notes, transferred the notes to a banker who knew nothing of the usury in discounting, which was a collateral independent transaction between other parties ; and when they came due the defendant, not being able to pay the notes to the banker who held them, gave him his bond, not for any usurious interest, but for the amount of the notes, which were in themselves untainted with usury.

It would seem strange if it could be thought for a moment that such a bond could be void in the hands of the banker who innocently took it for notes not usurious in themselves, and which he had not taken upon any usurious agreement. But the note here sued upon is affirmed by the defendant to have been given for the usurious interest itself, and given by the person making the corrupt agreement, and it is averred to be now sued upon by the agent of the assignees of the estate of the usurious lender. The defendant in our opinion, is entitled to judgment on the demurrer to the second plea, notwithstanding any of the exceptions that have been assigned as grounds of demurrer.

The fifth plea seems to be wholly insufficient, for it shews no connection between the transaction stated and the accounting together between this plaintiff and the defendant, which is the cause of action declared on in the second count. It should have been stated in this plea, that the usurious interest in the alleged loan being in arrear, the plaintiff, as agent for the representatives of the Bettridge estate, (and it should regularly have been stated in what capacity and for what purposes, or upon what trust they represent the estate,) accounted with the defendant concerning the moneys claimed to be due for such interest and that the account stated, as mentioned in that count, was an account stated of and concerning the said interest. Instead of that the defendant tells a story of an usurious agreement between other parties, with whom, for all that appears in the count or the plea, this plaintiff had no connection; and then says that the money mentioned in that count is part of the money in the mortgage between the defendant and Bettridge, without shewing how it can be a part of it, or in any manner shewing the connection. For anything stated in this plea the case might be of such a nature as regards the plaintiff's claim and the footing on which he is suing, as would bring it clearly within the principle of the case of *Cuthbert v. Haley*, and would shew that the alleged usury between other parties would be no defence under the circumstances against this defendant.

Judgment for the defendant on demurrer to 2nd plea,
and for the plaintiff on demurrer to the 5th plea.

SILVERTHORNE v. GILLESPIE, MOFFAT, ET AL.

Insurance—liability of agents in effecting—and for the efficiency of the captain and crew.

The plaintiff entrusted the defendants, as commission agents, with a quantity of flour, either to sell for him at Toronto, or to send it to be sold at Quebec, or other places as circumstances might require. He directed that the flour should be insured and the defendants effected an insurance with the B. A. Insurance Co. The flour was shipped by the defendants at Port Credit consigned to Messrs. G. & Co. at Quebec. Owing to the negligence and want of skill of the captain, and of a pilot who was taken in at Kingston, the vessel was stranded in the St. Lawrence and the cargo lost. The policy contained an express stipulation that the company would not be liable for any loss occasioned by the want of ordinary care or skill in the navigation of the vessel, and the plaintiff therefore failed to recover on it; but it appeared that this was the ordinary form of policy, and that the defendants could not have procured any other.

Held, that the plaintiff could maintain no action against the defendants for taking such a form of policy; and that in the absence of any ground for suspicion it was not their duty to inquire into the skill and experience of the captain or crew of the vessel.

And Semble, that if an insurance might have been effected on more favourable terms, yet the defendants would have been justified in insuring as they did, having received no special instructions, and the company being one with which such insurances were usually affected by the trade.

Assumpsit—The first count stated in substance, that, on the 1st of September, 1848, in consideration that the plaintiff would employ the defendants to receive from the plaintiff, and to sell for him on commission 1000 barrels of flour, the defendants promised the plaintiff to use due care and diligence in the custody, management, sale, and disposition of the flour as his agents; that the plaintiff did deliver the flour to the defendants for the purpose aforesaid: yet that the defendants, while they had the care of the same, took so little and such bad and improper care thereof, that the flour, through the neglect and default of the defendants, became wholly lost to the plaintiff.

In the second count the plaintiff, declared that in consideration that the plaintiff would employ the defendants as his factors and agents, in the custody, management, and procuring insurance against the dangers of navigation, and in the sale and disposition for the plaintiff of 1000 barrels of flour for certain commission and reward, &c., the defendants promised to receive the said flour for the purposes and on the terms aforesaid, and to use due care and diligence in and about the custody and sale thereof for the

plaintiff, *and to cause to be made insurance upon the same* to the value thereof; and to cause a policy of insurance to be made thereon, to the value of the said flour; and to cause the plaintiff to be insured in respect of the same *in the usual manner*, according to the custom of merchants and others, against the perils of the navigation of the lakes and rivers over which the same might be sent for sale as aforesaid; and to use proper care about the custody, sale, and insurance thereof: that the plaintiff, confiding in the said promise, delivered his flour to the defendants for the purposes aforesaid. And in this count the breach charged was, that although the defendants might and could have effected insurance upon the flour, and might have caused the plaintiff to be insured in respect thereof against the ordinary risks and dangers of the navigation, *in the usual manner and according to the custom of merchants* and others, and although they did cause the flour to be shipped in a vessel, called the Princess Victoria, to be carried from Port Credit to Quebec; yet the defendants *did not insure the said flour*, or procure to be made any insurance or policy of insurance, by any insurer or underwriter, to or for the plaintiff, to the value of the said flour, or any part thereof, against the risks and perils of the navigation, &c., but wholly neglected and refused so to do, and wrongfully permitted the said flour to go, and be carried in the said vessel on the said voyage, for sale as aforesaid, without any insurance made or effected thereon, for or in the name of the plaintiff, up to the time of the loss thereof as therein-after mentioned. The plaintiff then averred the loss of the flour on the passage from Port Credit to Quebec—to wit, on the 1st of October—by being stranded and sunk on certain rocks and shoals; whereby the flour of the plaintiff became wet, damaged, and destroyed, and wholly lost to the plaintiff; the said loss being by one of the perils and risks against which the plaintiff had employed the defendants to insure, and against which the defendants had promised the plaintiff to cause insurance to be made, and to cause a policy of insurance to be made, in respect whereof the plaintiff could and might have recovered from

the insurers the full amount of the said loss, if the defendants had performed their promise in that respect; whereby the plaintiff, by reason of the neglect, default, and breach of promise of the defendants in the premises, has wholly lost and been deprived of the insurance and indemnity which he might and would have received thereby.

In a third count the plaintiff declared, that in consideration that the plaintiff would retain the defendants, for certain commission in that behalf, as his factors and agents about the receipt, custody and sale of certain flour, and about the duly causing to be insured and effecting insurance thereon against the dangers of navigation, &c., the defendants promised the plaintiff to receive the said flour, and to use due care about the custody, and sale thereof; and to cause insurance to be made thereon, as is usual in the like cases, against risks of navigation, &c.; *and to use due and proper care, skill, and diligence in and about such insurance*, and the obtaining and effecting thereof: that he delivered his flour to the defendants, who accepted it for the purposes and on the terms aforesaid, and entered upon their retainer and employment: that the plaintiff up to the time of the loss was interested in the said flour to the value thereof: that the defendants, intending to forward the flour from Port Credit to Quebec for sale, by the vessel, called the Princess Victoria, procured a policy of insurance to be made by the British America Fire and Life Insurance Company, insuring the flour to the value of, &c., from Port Credit to Quebec; "by which policy the said company took upon themselves the adventure and perils of the lakes, rivers, jettisons, fires, and all other perils, losses and misfortunes that should come or happen, to the hurt or damage of the said property, excepting perils, losses and misfortunes arising from and caused by ice, theft, barratry, or robbery, *or from want of ordinary care or skill* such as is necessary and proper on such voyages and in such navigation, in lading or navigating the said vessel; and excepting all losses arising from or caused by the said vessel being unseaworthy, or unduly or improperly laden, on the voyage aforesaid: and that by the said policy it was further pro-

vided, that the said vessel should at all times during the continuance of the said policy be sound and seaworthy, and be well manned and found in anchors, cables, rigging, tackle, and apparel, and in all other things and means necessary and proper for the safe navigation thereof."

The plaintiff then averred that the defendants did not make or cause to be made any other insurance on the said flour: that in order to recover for any loss or damage to the said flour, so *insured*, it was necessary by the terms of the policy that such loss should not be caused by want of ordinary care or skill, such as was necessary and proper on such voyages, &c., or by the said vessel being unseaworthy or unduly or improperly laden on the voyage aforesaid of *all which the defendants had always due notice*: yet that the defendants, well knowing the premises, but not regarding their promise in that behalf, so carelessly, negligently, and improperly conducting themselves about the premises, and the insuring of the said flour; that, though the neglect and default of the defendants in the premises, the said flour so insured in manner aforesaid, and not otherwise insured, was shipped by the defendants in the said vessel—*which said vessel*, the plaintiff averred, was not during the said voyage, or at any time before or after the flour was so shipped, sound, or seaworthy, or well manned, or found in all things necessary or proper for the safe navigation thereof; nor was she duly or properly laden, or manned or directed with ordinary care or skill; but, on the contrary, the said vessel was, from the time of the commencement of the said voyage and the shipping of the said flour to the happening of the loss, &c., unseaworthy, and unduly and improperly laden, and was navigated and manned by unskilful and ignorant persons, without any necessary knowledge or acquaintance with the navigation of the lake and river through which she had to pass on the voyage aforesaid; of all which the defendants had notice: that the said vessel departed on the voyage with the plaintiff's flour on board; and by means of such improper and unskilful lading the flour became and was wetted and damaged to a large amount—to wit, 300*l.*—and also that the said vessel, on

her voyage from Port Credit to Quebec, and whilst the plaintiff's flour was on board of her—namely, at a place called “Cross-over Island,” in the river St. Lawrence—*was by the want of ordinary care and skill*, and by the negligence and gross ignorance of the persons navigating the said vessel, stranded, and sunk on certain rocks, and bilged and filled with water; whereby the flour of the plaintiff became damaged, &c., and wholly lost to the plaintiff: which said loss and damage being caused by the want of ordinary care and skill such as was necessary and proper on such voyages, and in lading and navigating the said vessel, was not a loss or damage recoverable against the insurers on the said policy, as it otherwise would have been; and the said insurers and underwriters on that ground wholly refused, and still refuse to pay the said loss, and have been, and are not answerable therefor: and so by reason of the want of due care, and the neglect, default, and breach of promise of the defendants in the premises, the plaintiff hath wholly lost and been deprived of his said flour, *and of the said insurance and policy*, and of the indemnity which he might and otherwise would have procured and enjoyed thereby.

And the plaintiff concluded by averring, that the defendants had broken their promise in making such insurance on his flour, under a policy which provided that the insurers did not undertake for any loss arising from the want of such ordinary care, or skill, and shipping the flour on board of a vessel which was not manned or navigated with due or ordinary care or skill such as was necessary and proper on such voyage and in such navigation, *and such as was necessary under such policy*.

Common counts were added for goods sold, &c., money received, money lent, and on an account stated.

The defendants pleaded—1. *Non assumpserunt*.

2. To the first count—that the flour was not lost by their neglect or default.

3. To the second count—that they did cause the plaintiff's flour to be insured according to the usual custom of merchants and others, against the ordinary risks, perils, and dangers of the navigation.

4. To the third count—that the defendants did use due care and diligence in the custody and sale of the said flour; and in causing the policy of insurance in that count mentioned to be subscribed to the value of the said flour; and in and about such insurance as was and is usual in the like case against the risks of the navigation, &c.; traversing specially that the defendants carelessly, negligently, or improperly conducted themselves about the premises in that count mentioned, *and about the insuring of the said flour*, in manner and form as therein alleged.

To the common counts the defendants pleaded also set off. and payment.

The plaintiff joined issue on all.

At the trial, before Sullivan J., at Toronto, the following appeared to be the facts of this case: the plaintiff, being a miller, resident in the country, had stored with a warehouseman at Port Credit, in the autum of 1848, a quantity of flour, and had taken his receipts for it; and having employed the defendants as commission agents to sell flour for him in Toronto, or to send it to be sold in Quebec, Montreal or New York, as the circumstances and prospects of the time might require, he sent to them the warehouse receipts for the flour now in question; and on the 21st of September, 1848, the defendants sent those receipts to the warehouse-keeper at Port Credit, with a letter saying “You will receive inclosed three receipts from yourself to Mr. F. Silverthorne for 500 barrels of flour, which we request you to ship per steamer “Princess Victoria” consigned to Messrs. Gillespie, Greenshields & Co., at Quebec, forwarding to us duplicate bills of lading, as you have done heretofore.”

The plaintiff directed that the flour should be insured, and charges for insurance were afterwards made against him by the defendants in their accounts.

The defendants insured the flour in the British America Insurance Company at Toronto, upon a policy such as is stated in the third count of the declaration; that is, expressly excepting from insurance “all losses arising from, or caused by want of ordinary care or skill, such as is necessary and proper on such voyages, and in such navigation, in lading or

navigating said vessel ; and excepting also all losses arising from, or caused by the said vessel being unseaworthy, or unduly or improperly laden on the voyage or trip."

And it was a stipulation contained in the policy, that "if the vessel shall be, or upon regular survey shall be found rotten and deemed unseaworthy, or unfit to prosecute her voyage on account of being unsound or rotten, then the company shall not be liable to make good any loss under the policy ; and that the said vessel shall at all times during the continuance of the said policy be sound and seaworthy, and be well manned and found in anchors, cables, rigging, tackling, and apparel ; also in all other things and means necessary and proper for the safe navigation thereof."

The case was amicably conducted at the trial, the desire being to procure the decision of this court on a fair statement of the facts upon the point whether the defendants had rendered themselves liable by reason of any such neglect or default as the plaintiff has complained of."

It was shewn that the flour was shipped on board of the "Princess Victoria" in October, 1848, at Port Credit : that she was a steamer ill adapted for the navigation of the lake, being old and of unsuitable construction, having been originally built for a ferry boat on the river St. Lawrence, between Montreal and LaPrairie : that after taking in this and other flour at Port Credit, she came to Toronto and took in a large additional quantity there : that she was too heavily laden, considering the lateness of the season, and the description of vessel ; and that those navigating her were inexperienced in the lake navigation : that the sea getting up after she left Toronto, she rolled and laboured so much that her cargo was a good deal damaged by her taking in water, and they were obliged to stop at one of the small ports on the lake between Toronto and Cobourg, and take out part of the flour : that she then proceeded on her voyage, and stopped at Kingston, where the captain might have procured a good river pilot, but did not do so, objecting to pay the charge, and alleging that he knew the river and wanted no pilot ; though he did take one on board, whose

qualifications were spoken of as being very indifferent: that it was observed on leaving Kingston that she was so awkwardly managed that it was concluded some accident would befall her: that on arriving at a point in the river St. Lawrence, a few miles above Brockville, after dark, but in moderate and not unfavourable weather, they passed a light-house well known to every one familiar with the navigation of the river and competent to take charge of a vessel upon it; that the captain and pilot, however, did not know what light it was, and though warned, they persisted in keeping on their course, instead of making a turn directly towards the north shore, as it was necessary to do immediately after passing that light: and that in consequence of this blunder the steamer ran on a rock and bilged, and the flour was damaged.

An action was brought in consequence on the policy, but the insurance company defended themselves on the grounds of the special exceptions in the policy, alleging that the loss arose from the improper overloading of the vessel, and from the unskilful and negligent management of the captain and crew, and from her unseaworthiness. They succeeded in satisfying the jury that their defence was true in fact, and a verdict was rendered in their favour. The particulars of the pleadings and the trial in that case of Gillespie & Co. v. B. N. A. Insurance Company are stated in the report of the case in 7 U. C. R. 108, and the judgment of the court shews on what grounds the verdict given for the defendants was sustained.

Upon the trial of the present case one witness swore that he had been long engaged in the flour trade, and in the habit of taking policies like the one excepted in this case, both from the same office and from others: that this is the ordinary and only form of policy he has known to be issued in this country.

Another witness swore that he had been many years engaged in the flour business: that he had employed these defendants as his agents, and introduced this plaintiff to them. He said he used to pay their commission, and did not trouble himself about the form of insurance.

The warehouse-keeper with whom this plaintiff had stored his flour at Port Credit was examined, and swore that he considered himself bound to obey the orders of the owners of the receipts, and therefore shipped the flour now in question as he was instructed by the defendants to do : that he saw nothing wrong about the vessel, but had heard a person express apprehension about her fitness for the voyage. She had been but once at Port Credit before.

The defendants' clerk, who effected the insurance, swore that he had never seen the vessel : that another person sending down flour told him he did not like her appearance, and wished his flour to be insured : that he did not read the conditions on the back of the policy, nor did his employers.

By consent the evidence given on trial of the action brought by these defendants on the policy, was read on this trial.

On the part of the plaintiff another witness was called, who swore that he had been a long time in the flour business, acting as agent : that he had always effected insurances, and always made inquiries into the character of the vessel and crew.

The loss was admitted.

The counsel for the defendants contended that the defendants did all that they were bound to do when they effected an insurance according to the custom of the trade : and he produced forms of policies from other offices which were all the same in regard to the exceptions and stipulations as the one taken out for the plaintiff's flour.

The learned judge remarked to the jury on the insufficiency of such a policy to afford adequate protection to the owners of cargo : and that it was unreasonable to leave them exposed without insurance against losses arising from causes over which they could have no control, such as the negligence and unskilfulness of the persons navigating the vessel, her unseaworthiness or want of proper equipments, though it might be fair to make such exceptions in insuring the vessel itself.

He directed the jury that if this were the only description

of policy that could be procured in Toronto, then it could not be negligence in the defendants that they had obtained no better, because they had no choice; but that in that case it was necessary to consider that the defendants had goods in their hands belonging to the plaintiff, in respect to which they were bound to act with due caution and diligence; and that as to those risks against which the defendants could procure no insurance, the plaintiff could only rely on the defendants' care and prudence in making the shipment. He observed that he thought it, under such circumstances, the duty of the defendants to inquire into and ascertain the seaworthiness of the vessel; though in the present instance the total loss, or even the greater loss did not appear to have arisen from want of seaworthiness: that it was also the duty of the defendants to inquire whether the ship was properly commanded and manned: that the loss did appear to have arisen from gross mismanagement and want of skill on the part of those who had charge of the vessel, but he considered that in that view of the case the defendants would not be liable for any loss arising from a change in the commanding, piloting, or manning the ship after the commencement of the voyage, and when the flour was beyond the defendants' control; but that if the loss arose from any default in the captain, officers, or crew, which the defendants might reasonably have foreseen or apprehended, or ascertained by reasonable inquiry, then he thought the defendants would be liable.

The jury on that charge found their verdict for the plaintiff, and 400*l.* damages.

Galt, for the defendants, obtained a rule nisi for a new trial on the law and evidence, for the admission of improper evidence, and for misdirection. He cited *Coggs v. Barnard*, 2 Lord Raymond, 917; *Comber v. Anderson et al.*, 1 Camp. 523.

Hagarty, Q. C., shewed cause, and cited *Smith v. Lascelles*, 2 T. R. 187; *Mallough v. Barber et al.*, 4 Camp. 150; *Moore v. Mourgue*, 2 Cow. 479; *Callander v. Oelrichs et al.*, 5 Bing. N. C. 58; *Arnould on Insurance*, 153, 154; *Duer on Insurance*, § 10, R. 127; *Story on Agency*, § 199.

ROBINSON, C. J., delivered the judgment of the court.

This case is of much consequence, because it involves principles necessary to be well settled and understood, inasmuch as they apply to a branch of business very extensively carried on in this province, and to transactions which are necessarily of daily occurrence, and requiring sometimes to be conducted through agents, without much time for deliberation or inquiry.

It is unnecessary to dwell upon what has been several times noticed, when the facts of this case have been under consideration at Nisi Prius, and in this court—namely, the very unsatisfactory position in which the owners of cargoes are placed by their inability to effect an insurance which will protect them against losses attributable to the ignorance, unskilfulness, or negligence of the persons navigating the vessel. Of course, for such losses the ship owners are responsible, but their responsibility may in many cases fail to afford indemnity.

It is evident to us, however, on considering this case, that it is impossible to hold these defendants, as agents, liable to the plaintiff on the ground of negligence in not procuring a policy on terms more favourable for the plaintiff than that which they did procure; because it was proved at the trial, and admitted on the argument, that they had no choice, and that it was not in their power to insure on other terms than they did.

If there even had been a choice of offices in this respect, and if the defendants could have obtained a policy from a solvent company, which would not have left the insured to bear losses arising from the causes to which the loss has been attributed in this case; still, considering that the office in question was the one in which insurance of this kind were usually effected, not only by the trade generally, but, as I infer from the evidence, in the course of other transactions between these same parties, and considering that no particular instructions had been given to the defendants upon the subject, and that no dissatisfaction is shewn to have been expressed by the plaintiff for a long time after the loss, and until after it had been found that there could

be no recovery upon the policy, there would be strong ground for contending, on the authority of adjudged cases, particularly those of *Moore v. Mourgue*, 2 Cowper 479, and *Comber v. Anderson*, 1 Camp. 523, that the defendants in this case would not be liable, as having been guilty of negligence in effecting the kind of insurance which they did effect; and the judgment of the Court of Common Pleas in *Chapman v. Walton*, 10 Bing. 57, might be fairly relied upon as having a bearing very favourable to the defendants, if the case must have turned on the mere fact of their not having obtained a different kind of policy. On the other hand, as to the case which I have just referred to, of *Moore v. Mourgue*, I doubt whether it would at the present day be upheld to the full extent. It seems to lay down the principle in language somewhat to favourable to the agent, and such as would scarcely afford to the principal sufficient protection; and indeed the court do, in that case, intimate, that if the jury had found for the plaintiff, they would probably not have granted a new trial.

On the whole, however, we are clear in the opinion that on the facts of this case, there cannot legally be a recovery against the agents for having accepted such a form of policy as they did accept here, for they had no means of doing better.

Then, if the agents are liable at all, it must be on some other grounds of negligence. It has been contended that the vessel was shewn to be unseaworthy, and was overloaded; and that the unskilful management of her, and the gross ignorance of the captain and pilot, occasioned her being stranded in the river.

As to these points, I have little doubt that the *Princess Victoria* was a vessel ill-adapted to the navigation of the lake; but perhaps not so obviously and certainly unsafe that the defendants would have been held justified in forbearing to take advantage of the opportunity of shipping by her if no other opportunity had presented itself that season, which was near closing, and if in consequence the plaintiff had lost the chance of a good market for his flour. Accidents are rare on these inland waters in propor-

tion to the great number of voyages, and I apprehend that shippers (not reflecting perhaps on the peculiar exceptions contained in these policies), do not usually make much inquiry about the seaworthiness of the craft, or the qualifications of the captain and crew.

But, from the actual events of the voyage in question, the liability as between these parties, does not appear to us to turn upon that; for, even admitting that upon that general kind of inspection which a mere mercantile agent could alone be expected to give, and without any minute examination of her build or equipments, the *Princess Victoria* must have appeared to be a very unsafe vessel upon which to ship a large quantity of flour to be carried across the lake; and, admitting also that the circumstances of Mr. Patterson having expressed an unfavorable opinion of her, ought to have led the defendants to decline employing her, yet that could not properly throw the loss upon the defendants, and particularly where no bad faith is imputed, unless it were clear that the loss of the flour arose from the bad qualities of the vessel. But it did not arise from that cause, nor from her being overladen, supposing the latter to be an impropriety for which the defendants were responsible. On the way to Port Darlington, the lake being rough, though the weather was not tempestuous, some water was shipped, and a portion of the flour barrels was exposed to wet; but whether any of the plaintiff's flour was injured on that occasion, and to what extent, was not shewn by the evidence; and without any examination being made for ascertaining the fact, a portion of the cargo was unloaded there, and left behind, and the steamer proceeded on her voyage, touched at Kingston, took in a person who professed to be a river pilot, and was ultimately stranded and sunk, in consequence of the master and pilot being either grossly ignorant or grossly negligent. It was explained in the judgment of this court in the case against the insurance company that the loss of the flour could be clearly and certainly ascribed to that casualty, and was not traced to any other cause; and that was a casualty not arising from any unseaworthiness in the vessel, or any other cause than

gross mismanagement of her at the moment. The defendants cannot on any reasonable principle be held liable for that. It is not shewn that when they directed the flour to be laden on board this steamer at Port Credit they had any reason to doubt that the master and crew were competent to the duty they had undertaken. The vessel had made a previous trip, and unless it were shewn in any such case that the agents had reason to suspect a want of skill, or a probable want of care and good conduct in the master and crew, the law would not hold them liable for such ignorance or misconduct. No such ground of suspicion was shewn in this case. As soon as the vessel left the harbour she and her cargo were beyond the control of the shippers; and so far as regards the shipment to Quebec, the defendants had acquitted themselves of their duty. They cannot be held to have undertaken to superintend the management of the vessel in her passage down. If the master and crew had all abandoned her, or neglected their duty in the grossest manner, and had taken in no river pilot, or if they had even stranded the vessel wantonly, the defendants would not be liable. No one can imagine that they would be.

The charge of the learned judge, we think, was in all respects correct; but it certainly did not justify the holding the defendants liable, unless the jury could see clearly from the evidence "that the loss happened from misconduct in the persons managing the vessel, which these defendants might reasonably have foreseen or apprehended if they had made reasonable inquiry." Then, where is the evidence upon which the jury could properly have thrown the loss upon the defendants on any of these grounds? Surely we cannot consider that a merchant's firm, conducting ordinary mercantile business, are expected, before they make a shipment in a vessel navigating these waters, to inquire into the nautical skill and experience of the captain, or his habits, or his character for caution. They are justified in assuming that he and his crew are competent to the business in which they are daily engaged. If that were not so, who could safely act for others in matters of this description?

How were the defendants to foresee that the captain would take an inexperienced or stupid pilot on board at Kingston; or that the pilot, or the captain, when they saw the light of a well known lighthouse on an island, would mistake it for a light of a dwelling house on the main shore—a blunder which clearly occasioned the accident?

It may be hard that the plaintiff should have no redress for his loss; but there is a legal remedy against the master and owners which in general would be sufficient, and their being insolvent, if that be so, does not alter the law. We could not on that account allow a loss to be thrown upon a party not liable for it, and upon principles which would be inconsistent with the necessary transaction of mercantile business, and would therefore most inconveniently clog the course of such business.

There is the less reason for imagining a want of ordinary care in these defendants, because, from the very nature of the transaction, their own interests were at stake. It appears by the evidence that the plaintiff had stipulated for large advances to be made on his flour, so that when it went to market it went in some measure as the property of the defendants, who were to sell it, and out of the proceeds repay themselves their advances. In our opinion there was really no such case made out in evidence as shewed the defendants to be liable, and there should therefore be a new trial without costs. (a)

Rule absolute.

MALLOCH V. SCOTT.

Anendment allowed after contingent damages assessed on demurrer.

Under the circumstances of this case the plaintiff was allowed to withdraw his demurrers on which contingent damages had been assessed, and to reply *de novo* to the defendant's pleas.

In this case a rule nisi was obtained in Trinity term last, which by consent of parties stood enlarged to this term, to shew cause why the verdict should not be set aside, and

(a) See *Wake v. Atty*, 4 Taunt. 493; *Campbell v. Rickards et al*, 5 B. & A. 840; *Rickards v. Murdock et al*, 10 B. & C. 541; *Park v. Hammond*, 6 Taunt. 495; 4 Camp. 344 S. C.; *Fomin v. Oswell*, 3 Camp. 357; *Story on Agency*, § 187; *Park on Insurance*, 3rd ed. 303, note (a)

a new trial had, with leave to the plaintiff to withdraw his demurrers to the fourth, fifth, seventh, and last pleas of the defendant, and reply thereto *de novo*, on payment of costs.

The plaintiff swore that the defendant owed him about 2,400*l.*: that a verdict was rendered for him in this cause (and contingent damages assessed on demurrers) for 1,900*l.* at the spring assizes at Bytown, in 1851: that his attorney filed demurrers without his knowledge, or any instructions from him, to the defendant's fourth, fifth, seventh, and eighth pleas: that he only was aware of this after the demurrers had been filed and entered for argument, and the issues in fact tried—viz., in May last—when he was advised the demurrers were not sustainable.

He swore that the defendant's fourth plea is true so far, that he, the plaintiff, did take from him his note for 500*l.* on account, but that the defendant paid no part of it when due, and it was all afterwards paid by the plaintiff to the bank which discounted it: that it was produced in court and filed on the trial of this cause.

As to the fifth plea, that he took a note of 500*l.* in satisfaction of so much of his debt, he swore that was not true.

As to the seventh plea, which pleaded that the moneys therein mentioned were advanced by him to the defendant upon a usurious contract, he swore that it was utterly untrue:

And so to the eighth plea, he swore that it was untrue: but all that occurred was, that the defendant did give him a power of attorney to receive certain money which he represented to be due him from the Ordnance Department, but that he never received any money thereon, for this reason, that the defendant, after giving him the power, drew the money himself, and paid a part of it to the plaintiff, for which he received credit at the trial.

The defendant, in answer to this rule, filed affidavits that he was not indebted to the plaintiff "in 2,400*l.*" on the cause of action declared on.

That his fourth, fifth, and seventh pleas are "just and true in every particular," (saying nothing of the eighth plea.)

And as to the seventh plea, he swore to circumstances which, if true, would have shewn that the plaintiff was urging a very unjust claim against him; but he said that the transaction mentioned in that plea having passed between him and the plaintiff in the presence of no other person, it was impossible to prove the truth of the said plea.

He annexed accounts and memoranda in corroboration of his statements.

Richards shewed cause, and cited *Breakenridge v. King*, 4 U. C. R., O. S. 297; *Robinson v. Rayley*, 1 Burr. 316; *Pearson v. Rogers*, 9 A. & E. 303.

Dalton, contra, cited the *Bank of B. N. America v. Ainley*, 7 U. C. R. 521; *Vin. Abr.*, Judgment, Q. 4.

ROBINSON C. J., delivered the judgment of the court.

If this were not a matter of account and the amount in question so large, we should certainly not interfere. So far as concerns the objection that contingent damages had been assessed, we should not feel ourselves absolutely disabled on that account from granting the amendment, especially in a case where the demurrers have been abandoned on the argument; though we are quite aware of the English authorities on that point, with which we have been much pressed on former occasions.

In *Breakenridge v. King*, 4 U. C. R. [O. S.] 297, and in several subsequent cases, we have deliberately taken a course in this respect which we shall continue to follow, according to the view we may take of what the substantial ends of justice may require as to allowing or disallowing the amendment in each case.

These circumstances in the present case are against the plaintiff; that he took exception to the defendant's pleas upon very frivolous grounds; and that, without waiting the result of his demurrers, he chose to go to trial, and thereby threw a difficulty in his way in regard to the amendment: but the delay is his own loss, and he did not put the court or the other party to the trouble of an argument of demurrers, which he says were put in by his attorney without his knowledge, and which he withdrew

as soon as he knew of their being filed, and was advised that they were untenable. We would not lay stress upon the client not knowing what course his attorney intended to take in his name : he takes, to most purposes, the chances of that when he puts his defence into an attorney's hand.

But we think it would be making the plaintiff pay too severe a penalty for his attorney's folly and frivolous demurrer, to hold him concluded as to a claim of 2000*l.* by defences which he swears are all utterly false ; and the defendant's affidavit is in one or two particulars not very satisfactory, even if we were disposed and at liberty to try the case upon affidavits.

We make the rule absolute for allowing the plaintiff to withdraw his demurrers and reply, on payment of costs ; for, whatever may be the fact as to our having named a certain time within which the plaintiff should apply, and his having let that time pass, we do not think that would be very material if we consider that the ends of justice will be promoted by the amendment. So long as the defendant has not entered judgment, which was the risk the plaintiff ran by the delay, we may in our discretion entertain the application.

Rule absolute.

HARVEY V. FERGUSSON.

Covenant on an indenture, whereby the defendant "leased and to farm let" to the plaintiff certain premises at a yearly rent ; the crops in the ground and the stock and implements of husbandry to be valued on the day of entry, and to be taken by the plaintiff at such valuation. The plaintiff demanded possession of the defendant at a tavern not on the premises ; but the defendant refused to give it, unless he was paid or received security for the value of the crop and stock, &c.

Held, that the defendant was justified in such refusal under the terms of the lease.

And *quære*, whether, if the lease had been without any stipulation, the demand of possession made would have been sufficient ?

Quære also, whether the words "lease and to farm let" imply a covenant to give possession on the day when the term is to commence ?

The plaintiff declared in covenant on a deed made on the 3rd of May, 1851, whereby the defendant did demise, lease, and to farm let to the plaintiff certain premises then occupied

by the defendant, being lot, &c., at the yearly rent of 6s. 3d. per acre of cleared land, for ten years from the 12th day of May, 1851; the rent to be paid yearly; "*the crops in the ground to be valued on the day of entry, and also the stock and implements of husbandry, which were to be taken by the plaintiff at such valuation;*" one half of the farm to be left in grass at the end of the lease, and the remainder in crop; the defendant to take the crop so in the ground, at the end of the lease, at a valuation—one valuator to be chosen by the plaintiff and one by the defendant, and an umpire by the two valuers; the valuation to be at cash value, and the payment thereof to be made on the first day of January succeeding the expiration of the lease, with interest from the expiration of the lease: and the plaintiff averred that the defendant did by the said deed "*covenant that he would, on the 12th day of May, 1851, yield and deliver to the plaintiff the land so demised to him:*" that he the plaintiff, had been always ready and willing to perform the agreement on his part, yet that "the defendant did not on the 12th day of May aforesaid, yield and deliver to the plaintiff the possession of the land so demised to him, or any part thereof, although requested so to do; but on the said 12th of May, and from thence hitherto, hath refused and still refuses to deliver possession of the same."

The defendant pleaded—1. *Non est factum.*

2. That he was on the 12th of May, 1851, ready and willing, and offered, and from thence hitherto hath been and still is ready and willing, to yield up and deliver to the plaintiff possession of the said land *under the terms of the said memorandum*, but that the plaintiff did not then, or at any time since, request the defendant to deliver to him possession thereof, or offer or propose to the defendant to take possession of the same; but on the contrary then refused, and from thence hitherto hath refused, and still doth refuse to take possession thereof under the said terms; and this he is ready to verify, &c.

3. That the defendant committed the alleged breach of covenant by the leave and license of the plaintiff.

4. That before the commencement of this suit the plaintiff

released the defendant from the said agreement, and all actions and demands in respect thereof.

The plaintiff replied to the second plea—that he did, on the 12th of May, 1851, request the defendant to yield and deliver up to him possession of the land *under the terms of the said memorandum*, but that the defendant then wholly refused.

To the third plea he replied *de injuriâ*.

To the fourth plea (of release) *non est factum*.

At the trial, before McLean, J., at Guelph, it appeared, that on the 12th of May, the plaintiff called on the defendant and requested him to proceed with the valuation, but the defendant said he would not let him into possession of his farm unless he paid or gave security for the value of the crops and stock, &c., to be valued; and he required also that it should be a condition of the lease that the defendant might, during the term, sell any portion of the land, and that the plaintiff should transfer and yield up possession of the part so sold. The plaintiff thereupon demanded possession, but the defendant refused: this demand was not made on the premises, but at a tavern near the place, and possession was demanded not of the farm alone, but of the farm and the stock, &c.

The subscribing witness to the lease swore that he understood that the plaintiff was to pay cash for the stock, &c.

The plaintiff first demanded the stock for valuation, when the defendant insisted that before he would give it up he must be secured in the amount at which it should be valued. This condition the plaintiff refused to comply with; and as they were separating, the plaintiff demanded possession of the farm, and the defendant said he should not have it.

The lease did not contain the word “demise,” but only the words “doth lease and to farm let,” and it was objected by the defendant’s counsel that the variance was fatal, for that covenants might be implied from the word “demise,” which would not be implied without it: that the words ‘lease and to farm let,’ do not raise a covenant to deliver possession on the day when the term is to commence:

that the action should have been for breach of the covenant for quiet enjoyment. The plaintiff, not assenting to the materiality of the variance, moved nevertheless for leave to amend by striking out the word "demise," which was allowed, and leave was reserved to move for a nonsuit.

The learned judge told the jury that he thought the defendant was not bound to give possession of the stock, or crops, or implements of husbandry, till the plaintiff had paid for them, or given satisfactory security; and that he should not be compelled to part with the possession of the farm till this point was arranged to his satisfaction.

The jury however gave a verdict for the plaintiff for 12*l.* 10*s.*

Cameron, Q. C., obtained a rule nisi to enter a non-suit on the leave reserved, or for a new trial on the law and evidence, and for misdirection. He cited Platt on Covenants, 79-81.

Vankoughnet, Q. C., shewed cause, and cited Bac. Abr. Lease R.; Co. Litt. 456; Shep. Touch. 160; Dyer, 257*a*; Com. Dig. Covenant A. 2; Style v. Herring, Cro. Jac. 73; Adams v. Gibney, 6 Bing. 656; Burnett v. Lynch, 5 B. & C. 589; Iggulden v. May, 9 Ves. 325; Williams v. Bosanquet et al., 1 Brod. & Bing. 238; Holder v. Taylor, Hob. Rep. 12; Robinson v. Harman, 1 Exch. Rep. 850; Richardson v. Chasen, 10 Q.B.R. 756; Coe v. Clay, 5 Bing. 440.

ROBINSON, C. J., delivered the judgment of the court.

We agree in the view taken by the learned judge at the trial, of the rights of the parties under the lease proved.

Admitting that the lease as it really stands—that is, without the word "demise," but containing the words "doth lease and to farm let,"—would equally afford ground for an implied covenant to give possession, according to the principle on which the case of Coe v. Clay was decided, (5 Bing. 440,) yet we must look at all the terms of the lease in this particular case, in order to ascertain what each party may legally insist upon under it.

Now here the defendant did not merely lease his land, as in ordinary cases. It was part of the contract that the lessee should take his crops on the ground, and his stock

and implements of husbandry at a valuation. As the plaintiff has himself set out the lease, the agreement was not merely that the lessee might have them, but that they were to be taken by him at a valuation.

We can give no other meaning to that, than that the lessee was to take them, and pay their value for them, when he entered into possession; and that he was not to be at liberty to take the land without buying the crops in the ground and the stock and farming implements, nor at liberty to take the latter without paying for them. In the same instrument, where it is provided that at the end of the term the lessor shall take the crops in the ground at a valuation and pay for them, a certain credit is given for such payment, which it is provided shall be made with interest; but in regard to the crops and stock, which the lessee is to take at a valuation with the farm, no such credit is stipulated for. The inference follows, that he is to pay for them when he gets them, and it is impossible, indeed, to give effect to the instrument in any other way.

The lessor could not be called upon to give up his farm on the 12th of May, 1851, unless the lessee was ready to pay him for his crops and stock, and thus to entitle himself to be let into possession of the land, which he had a right to say, as he does in effect by his lease, that he would not let to the lessee upon other terms. It is not necessary for us to determine whether—if this had been a demise in common form unaccompanied with such a stipulation—the lessee could have sued for a breach of covenant, merely because the lessor told him off the premises that he would not give him possession; and whether it would not have been necessary that the lessee should at least have gone to the premises and proceeded to take possession, or, if he found the lessor there, that he should at least have demanded of him there to allow him to enter; for our opinion is, that, without raising any difficulty on that point, the plaintiff did not shew himself upon the trial entitled to a verdict upon the issue of *non est factum*, for that upon the lease produced there is no such absolute covenant implied as the plaintiff has set out in his declaration—viz., “that the

fendant would on the 12th of May, 1851, yield and deliver to the plaintiff the possession of the land so demised to him." There was something else to be settled before the lessor was bound to give up possession. When the lessor asked him if he was prepared to give security for the value of the crops and the stock, he shewed a willingness to act reasonably and even liberally with him; and when the lessee refused even to do so much, he fully justified the other in withholding the possession from him, for he was under no covenant to let him have the farm on such terms.

I am disposed, further, to think that on the second plea the defendant was entitled to a verdict, for the evidence shewed that the defendant was willing to give possession according to the terms of the agreement, and the plaintiff did not, on the occasions referred to by the witnesses, request possession to be given to him upon those terms, but contrary to them.

As the plaintiff was entitled to a verdict on the third and fourth issues, we cannot properly grant a nonsuit; but we make the rule absolute for a new trial without costs, because the verdict was contrary to the direction of the judge upon a plain point of law, and the jury took upon themselves to overrule what we consider was a proper direction.

Rule absolute for a new trial without costs.

DOE DEM. BURNHAM V. SIMMONDS.

The plaintiff's attorney directed the sheriff to sell under a *fi. fa.* certain lots, describing them by mistake as being in the township of H. instead of M., but the numbers of the lots and concessions given being correct.

After the sale the error was discovered, and the sheriff then advertised and sold the proper lands under the same *fi. fa.*, which had expired.
Held, that the sale could not be supported.

Ejectment for 88 acres, being the east part of 7, in broken concession B., and the east part of the south half of 7, in broken concession A., in Murray.

The plaintiff made title as purchaser at a sheriff's sale under a *fi. fa.* at the suit of The Commercial Bank against one Robertson.

At the trial at Cobourg, before Robinson C. J., it appeared that the *fi. fa.* against lands was delivered to the Sheriff on the 15th of March, 1838, being returnable in Easter term, 1839. On the 10th of August, 1838, Robertson conveyed these lands to Simmonds, the now defendant.

The plaintiff's attorney, in the suit of the Commercial Bank v. Robertson, wrote to the sheriff informing him that Robertson owned certain lands which he was to seize, giving him the number of lots and concessions as above, but by mistake describing the lands as being in Haldimand instead of Murray. The sheriff advertised accordingly, and sold the lands as being in Haldimand on the 1st of June, 1839.

The mistake was discovered after the sale; and though the plaintiffs in the *fi. fa.* had at the sale bid off these lands (as in Haldimand) and other lands sufficient to pay their debt, and had acknowledged the writ to be discharged; yet when the error was made known, and that Robertson had no title to such lots in Haldimand, the sheriff advertised the above lands, describing them properly as in Murray, to be sold under the same writ, and did sell them on the 5th of October, 1839, to this lessor of the plaintiff.

There was no proof of any second *fi. fa.* against lands, and the sheriff swore he believed he advertised and sold them under the first writ, returnable in Easter term, 1839; and if so, then it was objected that the sale could not be legal, as nothing was shewn to have been done that could be treated as a seizure of these lands in Murray, nor anything that would make the writ attach upon them while it was current.

The learned Chief Justice held that the sale could not be upheld, but reserved leave to the plaintiff to move to enter a verdict for him if the court should be of another opinion. A verdict was in the meantime given for the defendant.

It appeared on the trial that the debtor Robertson had only an undivided fourth part or share in these lands. though he had made a conveyance to Simmonds as if he owned the whole interest in them.

M. Vankoughnet moved to enter a verdict for the plaintiff.

Eccles shewed cause, and cited *Doe Greenshields v. Garrow*, 5 U. C. R. 237.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that we must discharge this rule. There is no room for ascribing any intention even in the sheriff to seize the land in Murray which is in question in this action while the execution was current; for it was no mistake of his that he advertised and sold the land as if it were in Haldimand. The plaintiff's attorney had by mistake given him the numbers of these lots as of land in Haldimand owned by the debtor. Acting on that information the sheriff sold accordingly, but it turned out that the debtor owned no such land in Haldimand as the sheriff had been directed to sell. Before this discovery was made the *fi. fa.* had run out. It was past its return, and the sheriff could no more seize and sell under this expired writ the land now in question, than he could have sold a lot in Cobourg or Port Hope belonging to the debtor, which he had heard for the first time after the return of the writ.

Rule discharged.

FARLEY ET AL V. GRAHAM.

Assumpsit for work and labor. The plaintiffs' witnesses swore that the work was done upon a written agreement, which he had in court, but refused to produce. He had not been subpoenaed.

Held, that the witness was as much bound to produce the writing as if in attendance under a *subpœna duces tecum*.

But *semble*, that if the witness had been required by the court to produce the agreement, and had still refused, this would not have been sufficient to warrant the reception of secondary evidence.

Assumpsit on the common counts.

Pleas—Non-assumpsit, payment, and set-off.

The claim of the plaintiffs was for work done to a mill-race for the defendant.

At the trial, before Sullivan, J., their witness swore that the work was done upon a written agreement, which was given to him by the parties to keep; that he had it with him in court, but would not produce it. He had not been served with a *subpœna duces tecum*, or indeed a *subpœna* of any kind, and the learned judge held that he was therefore not bound to produce the writing.

The plaintiffs objected to this ruling, but submitted to a nonsuit.

Bell, for the plaintiffs, moved for a new trial, for misdirection, the rejection of evidence, and on the ground of surprise. He cited *Snelgrove v. Stevens*, 1 Car. & Marsh. 508.

Cameron, Q. C., shewed cause, and cited *Doe Gilbert v. Ross*, 7 M. & W. 102; *Hibberd v. Knight*, 2 Exch. Rep. 11; *Corsen v. Dubois*; *Holt, N. P. C.* 239; *Doe dem Loscombe v. Clifford*, 3 Car. & Kir. 448.

ROBINSON, C. J., delivered the judgment of the court.

It appears from the cases of *Fielder v. Ray*, 6 Bing. 332; *Doe dem Wood v. Morris*, 12 East. 237; *Brewer v. Palmer*, 2 Esp. 213, and other cases, that when the fact of there being a contract in writing between the parties comes out upon cross-examination of the plaintiff's witness, and it appears to the court that the plaintiff ought to have proceeded upon the written agreement, and not sued as upon a parol agreement or an implied contract, then the defendant can claim to have the plaintiff nonsuited without giving further evidence of the agreement; but that if the fact of there being a writing comes from the defendant after the plaintiff has closed his case, then, in order to entitle himself to the benefit of the exception, the defendant must give proper evidence of the fact of there being a writing, and shew its application to the cause of action. The distinction is very clearly taken also in a case of *Fenn dem. Thomas v. Griffith*, 6 Bing. 533.

Here the fact of there being a writing was proved by the plaintiffs' own witness, and the *onus* of producing it before he could proceed with his case rested with him. He did not obtain its production, and was therefore nonsuited, and he had not taken measures for its production by subpoenaing the person in whose custody he must have known it was; but the case of *Doe dem. Loscombe v. Clifford*, 2 Car. & Kir. 448, is an authority for holding, what I do not find elsewhere questioned, that when the writing is in court, and the person having it in his possession, being sworn as a witness, refuses to produce it, it is the same thing as if he

had brought the writing into court under a *subpcena duces tecum*, and had refused to produce it.—*Snelgrove v. Stevens*, 1 Car. & M. 508, is indeed to the same effect, and was confirmed and acted upon by Baron Alderson in *Doe dem. Loscombe v. Clifford*.

Then the question is, what should follow as a consequence when the witness does not produce the writing. If he had no good reason to give for not producing it, which I take clearly to have been the case here, then it does not follow, I apprehend that the arbitrary refusal of the witness would warrant the judge in receiving secondary evidence.

The witness I think, should have been first told by the learned judge that, being sworn as a witness, his not having been subpoenaed was of no moment, and that he was nevertheless bound to produce the paper. If he had done so, we must presume he would have complied, and then the plaintiffs would have had the evidence they required. At any rate, we do not know that he would not. If the witness, however, had still declined, I see no authority for admitting secondary evidence under such circumstances. I suppose the court could not actually force the writing out of the party's possession at the trial, and could only commit him for contempt if the judge had peremptorily directed the witness to produce it, and he had refused; and the party might have sought his remedy against the witness, if advised that he could support an action, although he had not caused the party to be served with a subpoena. I refer to *Amey v. Long* 9 East. 473; and *Field v. Beaumont*, 1 Swanston 209.

It is rather singular that no case can be found, precisely in point with the present—that is, where the witness having no ground for objecting to produce a paper, has yet refused, and the plaintiff has been nonsuited in consequence. I suppose if no such case has happened, it is because a witness, having no ground for declining, would never be likely to persist in his refusal after being told by the judge that he was bound to produce it. If therefore the cases of *Snelgrove v. Stevens* and *Doe dem. Loscombe v. Clifford* were

rightly decided—and one of them was by a learned judge of very long experience—the difficulty here may be fairly taken to have arisen in consequence of the learned judge having taken an erroneous view of the position of the witness.

The proper effect of that would ordinarily be, that the plaintiffs should be relieved from the nonsuit without their paying costs. Against that it may urged, that the plaintiffs were improperly proceeding at the trial as if there were no special contract in writing, when their own witness proved that there was such a contract, and so that the plaintiffs were themselves the occasion of the difficulty; that the writing was deposited with this witness as the common depository of both parties, and was as much under the control of one party as the other; that there is no reason to assume that the plaintiffs could not have obtained possession of the writing for the purpose of suing upon it; and that at all events if they had subpoenaed the party, as they should have done, there is much reason to suppose that there would have been no difficulty at the trial. The defendant may therefore reasonably urge, that the plaintiffs have got into a difficulty by proceeding irregularly, and are not entitled to assume that if they had subpoenaed the party, or taken the usual steps for possessing themselves of the writing, any such difficulty would have arisen.

On the whole, we consider that justice will best be done under the circumstances by granting a new trial, with costs to abide the event—the effect of which will be, that the plaintiffs will not in any case receive the costs of the first trial, but that if the defendant is successful a second time, he will have the costs of both trials, as he should have, if the plaintiffs shall be found to have been urging on an action in which they are not entitled to succeed.

Rule absolute—costs to abide the event (a).

(a) See *Doe dem. Warteny v. Grey*, 1 Stark. Ca. 283; *Miles et al. v. Dawson*, 1 Esp. 405; *Rex. v. Sadler et al.*, 4 C. & P. 218; *Doe dem. The Earl of Egremont v. Date*, 3 Q. B. R. 610.

IN RE WRIGHT AND THE MUNICIPAL COUNCIL OF THE
TOWNSHIP OF CORNWALL.

12 Vic. ch. 81, sec. 31, sub-sec. 7; sec. 41, sub-secs. 7 & 9; sec. 132—*By-law quashed.*

Township Councils have no authority to pass by-laws providing for the remuneration of their own members.

Brough, obtained a rule on the defendants to shew cause why by-laws 11 and 12, passed on the 18th of June, 1850; No. 20, passed on the 28th of December, 1850; No. 22, passed on the 11th of January, 1851; and No. 30, passed on the 23rd of July, 1851, should not be quashed, in so far as they direct or authorize payment of remuneration to the township councillors for the township of Cornwall.

No. 12 was intituled "By-law authorising the payment of salaries to public officers, and remuneration of councillors," and ordained that the several township officers and councillors therein enumerated should receive as salaries and remunerations the sums set opposite their names in a schedule annexed, to be paid out the available funds of the township, and that they might be paid half-yearly by order of the council."

And in that schedule was, among other items—"Members of this council, 6s. 3d. per day," &c.

No. 11, passed on the same day, (the 18th of June, 1850), ordained that the persons enumerated be allowed the sums set opposite their respective names.

In the list were—

James M. Dixon, town reeve.....	£1	17	6
John McDonald, deputy town reeve.....	2	3	9
Alexander McDonald.....	2	3	9
Donald McDonald.....	2	3	9
George J. Dixon.....	1	17	6

No. 20, passed on the 28th of December, 1850, ordained that there be paid by the township treasurer.

To James M. Dixon, reeve, for remuneration.....	£1	11	3
George J. Dixon.....	1	11	3
Donald McDonald.....	1	11	3
Alexander McDonald.....	1	11	3
John McDonald.....	1	11	3

No. 22, passed on the 11th of January, 1851, ordained that the township treasurer be authorised to pay

James M. Dixon, reeve, (not said on what account)...	£0	6	3
John McDonald, deputy reeve.....	0	6	3
Donald McDonald, Esq.....	0	6	3
Alexander McDonald, Esq.....	0	6	3
George J. Dixon, Esq.....	0	6	3

The above three by-laws were all intituled, "By-law authorizing the payment of orders and accounts approved of by the council."

No. 30, passed on the 23rd of July, 1851, was intituled, "By-law authorizing the payment of salaries to public officers, and renumeration of township councillors."

It ordained that the treasurer should pay

B. G. French, (not saying why)	£3	8	9
John McDonald, reeve	3	8	9
Duncan Fraser, deputy reeve	3	8	9
James M. Dixon, Esq	3	8	9
John A. Cameron, Esq.....	2	16	3

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion, which indeed we have already expressed on another occasion, that the by-laws moved against are illegal. It is the 7th subdivision of the 31st section of 12 Vic. ch. 81, which must govern the decision. That provides that the township councils may make by-laws "for settling the renumeration of all *township officers* in all cases where the same is not or shall not be settled by act of the legislature, and for providing for the payment of the remuneration by such act of the legislature, or by the by-laws of the said municipality, provided and appointed for all township officers whatsoever."

Are township *councillors* included in the words "township officers" used in this clause? We think it plain they are not. If they were nothing in any other part of the statute to shew what was intended, I should find it difficult to hold that they were included, for when we speak of the officers of a legislative body, we do not in general mean to include the members of that body; and when we consider that there is no other authority required to concur with the township council in passing their by-laws, it does not seem probable that it could have been intended to allow them by

their own votes to divide as much of the public revenue among themselves as they pleased. If the legislature had intended to give them the power of voting salaries or allowances to themselves, they would have surely provided some checks upon the exercise of that power, and their not having done so is a convincing proof that they did not conceive that they were delegating any such authority to them; and this becomes evident when we look at the 41st section For township councillors it does not seem to have been thought that any remuneration need be provided, because, having only to attend within the township, it might be reasonably supposed that they could return to their homes when the business of the day was ended; but in regard to the County councillors, the case was different; their attendance must subject them not merely to loss of time, but to considerable expense, and the legislature, attending to that circumstance, when they came to define for what purposes they may make by-laws, enact, by the 7th subdivision of the 41st section, that they may make laws "for the settling the remuneration to all *county officers*," exactly following the words of the 7th subdivision of the 31st clause; but not meaning to embrace in these words the members of the council, and not understanding that they were included, but yet meaning to remunerate them for their attendance they deem it necessary to add a special provision for that purpose, which they do in the 9th subdivision, giving by it a power to the council to make by-laws for settling a rate at which the town reeves shall be remunerated for their attendance at the council; and they are careful to provide this salutary check, that no such law which they may make shall take effect till two years have elapsed from its passing. There can be no plainer proof than this 41st section affords of what was meant by the 31st section. Mr. Brough very candidly directed our attention to the 132nd clause, as one which he understood was relied upon as giving implied authority to the township councils to vote a remuneration to themselves; but we think it does not embarrass the question, because, as county councillors may clearly be allowed a remuneration, the exception contained in the parentheses

in that clause was proper on that account, and there is no warrant for extending it further than to them. We must therefore make the rule absolute for quashing such parts of those laws as relate to the granting of any remuneration to the township councillors for their attendance; and the late statute, 14 & 15 Vic. ch 109, sec. 35, provides that the costs of this application must follow.

Rule absolute.

DOE DEM. WILKINS V. JOHN MOORE AND DANIEL MOORE.

The defendant's attorney, being the subscribing witness to certain deeds, was asked before the trial by the attorney for the plaintiff, to admit their execution. He said that he would do so when put into the box, but insisted on being called as a witness. While the jury were being called for the trial of the cause he absented himself from the court, and did not return. *Held*, that the deeds could not be received as proved on evidence of such agreement to admit—and *quære*, whether it would have been sufficient to warrant the reception of proof of the witness's handwriting?

The plaintiff, however, shewed himself entitled, on other evidence to part of the land claimed, and the court refused to disturb the verdict for the whole.

Ejectment for the west half of lot 60, and the east half of 61, in the first concession Bay side of Ameliasburg.

John Moore defended for the above half lots, excepting a small portion of the west half of 60. Daniel Moore defended for one acre of land, a part of lot 60 (being the piece of land excepted by John Moore.)

At the trial before Macauley, C. J., at Picton, it appeared that the lessor of the plaintiff had received a mortgage of the premises from John Moore on the 18th of January, 1850, and on the same day gave him back a lease for a year at a nominal rate. After the year expired, John Moore still continuing in possession, a third party (Reddick) wished to lease the east half of 61, and went to the lessor of the plaintiff for that purpose. They agreed on the terms, but Reddick desired to ascertain first whether John Moore was ready to go out, or was likely to give any trouble, and went and spoke to him, and was told he had no objection, and that he intended to leave the place at once. Reddick then got possession, and began to plough, and repair fences, when some days after John Moore came, and threw down

the fences and interrupted Reddick in his possession. Reddick, rather than have trouble with him, gave up possession, and the plaintiff then brought this action to turn John Moore out. This evidence applied only to the east half of 61.

The lessor of the plaintiff did not intend to rely upon it, but was prepared as he supposed to prove both the mortgage to Wilkins, and the lease back from Wilkins to John Moore, by the evidence of the subscribing witness, who happened to be the defendant's attorney, Allan R. Dougall.

Mr. Wallbridge, the plaintiff's attorney, swore upon the trial, that some days before the trial he had gone to Mr. Dougall, and shewn him both writings, and asked him whether he would admit their execution; he said he would if he should be put into the box, but alleged that he had some explanations to offer, and therefore insisted that he should be called as a witness: a communication to the same effect took place just before the trial. Mr. Dougall was in court while the jury were being called, but during that period absented himself, and, though there was a delay of some hours before the verdict was taken, he did not return, nor was any explanation given of the reason of his absence.

The plaintiff's counsel pressed that, under such circumstances, the writings should be received as proved, upon the evidence of Mr. Dougall's agreement to admit them.

A verdict was given for the plaintiff.

Eccles, for the defendants, obtained a rule nisi for a new trial without costs, for misdirection and for the reception of improper evidence, and on the law and evidence.

Wallbridge shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the deed and lease cannot be taken to have been proved on the trial, because even an unconditional undertaking to admit on the trial is not *ipso facto* an admission, still less when the promise did not go that length, but was accompanied with a stipulation that the plaintiff must call the witness.

It is true that Mr. Dougall, by his own conduct, and I am sorry to be obliged to add, very vexatious and improper

conduct, as it appeared to the learned judge at the trial, and as it appears to us on his notes, put it out of the power of the plaintiff's attorney to put him in the box as a witness; but that cannot enable us to dispense with the rules of evidence, and to hold a deed established which is not proved, and is not in fact admitted, though agreed to be admitted on the trial *sub modo*; though it may warrant the reception of proof of the witness's handwriting. Considering that the defendant's attorney was himself the subscribing witness, we cannot look upon the conversation between him and Mr. Wallbridge as anything more than this: "I did see those writings executed; I shall say so on the trial when called as a witness, but you must call me."

If the plaintiff's attorney is satisfied that Mr. Dougall absented himself wilfully, in order to throw an impediment in his way, he must consider whether it may not be proper for him to make an application to the court, rather than that his client should suffer any inconvenience or expense by such conduct, which it would be the plain duty of this court to discountenance. That, however, would only indirectly compensate the plaintiff for any loss he may have been put to by the non-attendance of Mr. Dougall. In the meantime it seems clear to us that the plaintiff is entitled, on Reddick's evidence, to a verdict against John Moore, for the east half of lot 61. The verdict was taken generally, as is usual in ejectments. If the defendants, or either of them, think that any object will be gained by it, a motion can be made to restrain the execution of the writ of *hab. fac. poss.* to the east half of lot 61; but we should certainly not interfere with the verdict, unless it shall be clearly shewn to us that some injustice will be done, or is to be apprehended, from the verdict going into effect for the whole.

Rule discharged. (a)

(a) See *Burt v. Walker*, 4 B. & Al. 697; *Parker v. Hoskins*, 2 Taunt. 223. *Spooner v. Payne*, 4 C. B. 328.

IN RE COYNE AND THE MUNICIPAL COUNCIL OF THE
TOWNSHIP OF DUNWICH.

12 Vic. ch. 81, sec. 31, sub-sec. 14, sec. 116 ; 13 & 14 Vic. ch. 65.

Municipal corporations have no authority to *appoint* by their by-laws the persons who are to receive licenses for keeping taverns.

In the last term *Jones* obtained a rule calling upon the Municipal Council of the township of Dunwich to shew cause why a by-law passed by them on the 7th of February, 1851, intituled "By-law No. 18, to provide for the licensing and keeping houses of entertainment to sell wines and spirituous liquors in the township of Dunwich," should not be quashed in whole or in part :

1st, Because it infringes the 116th section of 12 Vic. ch. 81, in granting exclusive privileges.

2nd, Because it is illegal, in purporting to grant licenses to keep taverns or houses of public entertainment, the same not being within the power of the council, except under certain circumstances, which are not averred in the by-law, and being in all other cases a duty committed by the legislature to certain public officers.

The by-law recited, that by statute 12 Vic. ch. 81, it is made lawful for any municipal council to make by-laws for the licensing of inns and other houses of entertainment, &c. ; and that by statute 13 & 14 Vic. ch. 65, power is given to the municipality of each township to fix the taxes and conditions to be complied with by any person desiring such license, the kind of house he shall keep, and the security he shall give for observing all the by-laws for such purposes, and also the sum to be paid by him above the duty imposed by the British statute 14 Geo. III. ch. 88 ; and for regulating all such inns, and imposing penalties for any violation of the by-laws.

And it enacted, among other things, that license be granted to the following persons to keep tavern from the 1st of March, 1851, to the 1st of March, 1852, wherein wines and spirituous liquors may be sold and used ; and that the sum to be paid by each of the said persons should be the sum set opposite their respective names, exclusive of fees, viz :

Isaac League, in his present residence.....	£4
Archibald McFarlane, "	2
Mrs. O'Malley, "	2

And it was further enacted, that license should be granted to other persons within the said township, applying for the same, *and approved of by the council*, for the following periods, viz :

For 9 months, commencing on the 1st of June.

“ 6 months, commencing on the 1st of September.

“ 3 months, commencing on the 1st of December.

And that all such licenses granted for a longer period than three months should be transferable as thereafter provided.

No cause was shewn.

ROBINSON, C. J., delivered the judgment of the court.

The 116th clause of the act 12 Vic. ch. 81, seems unguardedly expressed, for in terms very comprehensive it seems to prohibit that being done in any case which in other parts of the act it is made the duty of the municipality in certain cases to do. We must intend the legislature to have meant that, except in cases provided for by law, they shall not have the authority to give to any person or persons an exclusive right or privilege to exercise any trade or calling within the locality, or to require a license to be taken out for exercising the same, or to impose a tax on any such person. They never could have intended this clause to extend to taverns and tavern licenses, though keeping a tavern is certainly a calling : and at any rate the subsequent act, 13 & 14 Vic. ch. 65, puts an end to any doubt that could have been started as to the possible application of that clause to the calling of innkeepers. I see nothing in the 12 Vic. ch. 81, or in the 13 & 14 Vic. ch. 65, or any other act, that authorises the council to appoint by their by-law the persons who are to receive licenses for keeping taverns. I mean, to take into their hands, not under any particular circumstances, or in any special or excepted case, but generally for the year, the nomination of the parties who are to receive licenses. The Statute 13 & 14 Vic. ch. 65, evidently does not contemplate that they are to perform any such function, but that they are to have a superintendence over that department of the public service, as to prescribing regulations, the conditions of the license,

and the number of persons to be licensed. The intention seems to be that there shall be no selection by them of the persons who are to be allowed licenses; but they have a control in regard to the number; and when they reduce it, which must necessarily have the effect of excluding some, it is to rest with the inspectors to determine what persons, among those who have obtained certificates, shall receive licenses. The words, "subject to any by-law passed for their guidance in this behalf," do not, we think, extend farther then to enable the councils to prescribe rules and principles which may guide them in their selection, not to take the selection out of their hands by naming the parties. It is of little moment, however, so far as the actual operation of the by-law now moved against can be affected, what may be the result of this application; for the parties named in it will have had the full benefit of their license before notice of our order can reach the township, or in two or three days after.

It has not been attempted to support this by-law. We think it illegal, and make absolute the rule nisi for quashing it.

Rule absolute.

HOWARD V. WILSON.

Action for dower by T. H. and S. H., his wife, in lands of the former husband of S. H.

The defendant pleaded a release by S. H. after action brought, and an examination and certificate by two justices of the peace, according to the provisions of 3 W. IV. ch. 9.

Held on demurrer; plea bad, for that statute is not applicable to this case, but the examination and certificate should have been such as are required by the 37 Geo. III. ch. 7, or the 50 Geo. III. ch. 10.

And *quære*, whether a release without the husband's concurrence could in any case be effectual to bar the action.

Action for dower by Thomas Howard and Susan Howard, his wife, formerly the wife of Robert Wilson deceased, in land of the said Robert Wilson.

Plea—That heretofore—to wit, on, &c.—and after the commencement of this action, the said Susan released under her seal to the defendant all her right or title to dower in, to, and out of the said lands; and that she did, on the day

and year aforesaid appear before two justices of the peace and acknowledged her consent to be barred of her dower in the said lands ; and the said justices after such acknowledgement, indorsed on the said deed of release a certificate of such examination, and that the said Susan did give her consent to be barred of her right of dower freely and voluntarily, &c.

Demurrer : assigning for causes, that the release pleaded does not release the right of action at the time it was commenced, which right still remains for the detention of the dower at that time : and that it is not stated to have been with the consent of the husband of the said Susan Howard.

Hector for the demurrer. *Read contra.*

ROBINSON, C. J., delivered the judgment of the court.

The widow, we think, had no estate in dower, because none had been assigned to her ; she had her claim to dower, but no legal estate in any of the lands of which her husband had been seized. Her right was complete on the death of her husband, but it was only a right to have dower admeasured ; she had no estate. Could she then release her right of dower—in other words, bar herself of her claim—by a deed executed by herself alone, she being at the time married to a second husband ? It is contended that she cannot, for that our statute 2 Vic. ch. 6 prevents her ; but the first and second clauses of that act relate not to a conveyance or release of dower, but the alienation of a *feme covert* of real estate of which she is seized in her own right, and the widow here had not become seized of any estate, in this land. The 3rd and 4th clauses of that act, however do relate to dower.—The 3rd clause dispenses with the examination and certificate respecting the free consent of the married woman, in all cases in which *she joins with* her husband in a deed releasing her right of dower. Then, if before this statute she could by a deed executed by herself only have released her dower, provided an examination took place, and a certificate were given in regard to her free consent, I cannot see that this clause would have disabled her from afterwards releasing in the same manner. It is an enabling clause, not in any sense

restrictive, nor intended to be so. Then, how was it upon the former statutes, 37 Geo. III. ch. 7, and 3 Wm. IV. ch. 9? The 37 Geo. III. ch. 7, expressly makes it lawful for *any person* entitled to dower, by any deed, executed alone or jointly with other persons to release all her right and title to dower in the lands mentioned in such deed: and it makes such release as effectual to bar her as if a fine had been levied thereof. But it requires an examination by a judge, and a certificate of free consent of the party releasing. It is rather curious that this act is not in its language confined or applied to married women, but applies to "*any person* entitled to dower." The 50 Geo. III. ch. 10, and 3 Wm. IV. ch. 9, give only greater facilities for obtaining a certificate. The 1 Wm. IV. ch. 2 relates only to alienations by married women of their real estate; and I see nothing in any of the acts which makes a married woman less capable now of releasing her dower, by a deed executed by herself alone, than she was by the statute 37 Geo. III. ch. 7, which enables her to release her dower by deed executed by herself, and makes her conveyance as effectual as if a fine had been levied. There are, however, some apparent incongruities in the statutes, for by 2 Vic. ch. 6, if she joins with her husband in a deed whereby she releases her dower, she shall be barred without any examination or certificate, whereas if she releases her dower by a deed executed by herself alone, she must be examined, for the 2 Vic. ch. 6 does not extend to the latter case, though the danger of coercion would seem to be greater in the former case than the latter. And the statute 3 Wm. IV. ch. 9, under which alone I can find that an examination taken, as this was, before justices of the peace will be valid, seems to apply to cases where the wife wishes to bar her dower in lands *which her husband may be about to depart with*, and to refer therefore to dispositions of the property made by the husband, through whose seizin she claims her right to dower. The enacting clause is not expressly confined to such cases; but I think, taking the act altogether, we must see that that was the intention; and if so, then this deed cannot acquire validity under the former statute

37 Geo. III. ch. 7, but would, according to that act, be expressly invalid, for want of the kind of examination and certificate made indispensable by it. The legislature taking up the subject at different times, for different purposes, and with different views, have left the matter to depend on a variety of acts not easily to be reconciled with each other; but we think that, for the reasons I have just mentioned, we must hold that the release pleaded has "no force or effect to bar the person entitled to dower," for those are the words of the 2nd clause of 37 Geo. III. ch. 7, for want of the certificate which that act requires, and which no subsequent act dispenses with, except when the husband is conveying the land, or except where, under 50, Geo. III. ch. 10, an examination takes place before a judge of the District Court, or chairman of the Quarter Sessions, which is not the case here.

Judgment for the plaintiff.

BROWN V. THE MUNICIPAL COUNCIL OF THE COUNTY OF YORK.

The 35th sec. of 14 & 15 Vic., ch. 109, has not a retrospective operation, and the Court therefore discharged a rule calling upon the defendants to pay the costs of an application on which a by-law had been quashed before the passing of that act.

In Easter term, 1851 (the 25th of June), a rule was made in this court, after cause shewn, that a by-law passed by the Municipal Council of the county of York, for opening a road between lots 4 and 5, in the 4th concession of the township of Toronto, East of Hurontario street, be quashed; the objection being that the road was not legally established by the by-law, the line of road not being described in the by-law, nor made certain by it, nor its width specified. (a)

In Michaelmas term following (1851) *Cameron*, Q. C., applied for, and obtained a rule on the defendants, to shew cause why they should not pay the costs of the rule quashing the said by-law, and of this application.

Hagarty, Q. C., shewed cause.

ROBINSON, C. J.—This application is made in consequence of parliament having, in August, 1851, passed an act, 14 & 15 Vic., ch. 109, (sec. 35), by which it is provided that whenever any by-law shall be or *has been* passed by any municipality, and such by-law *has been* or shall be quashed by any court having competent jurisdiction, such municipality shall pay all costs and expenses attending the quashing of such by-law. It is contended that this has a retrospective operation, and gives costs of applications which had been heard and determined before the passing of the act; but we do not think so, although the language will bear that construction. It has been repeatedly held, that where a statute is meant to have an *ex post facto* operation, that intention must be so clearly expressed as not to leave room for doubt. Now here, I think it is not reasonable to imagine that the legislature intended that we should open a matter that had been finally disposed of, and, as we must suppose, properly in regard to costs, upon the law as it stood at the time, for the purpose of giving costs under a change of the law, which, where it applies, leaves nothing in our discretion.

The legislature, I quite admit, may have meant that; but I am not clear that they did, and it would be unreasonable, I think, to assume that they did, if the language they have used is not so explicit as to shew that intention plainly. They meant, I have no doubt, to give to persons injured by any by-law which had been quashed before this statute passed a remedy (where that would properly lie) against the municipality; but then the proceeding for that remedy would be a matter altogether prospective, and would be commenced and carried on after the act was passed. It would require no reversing or opening up of any matter that had been adjudged upon and finally closed.

As regards the giving costs of the application to quash a by-law, we consider that the statute means further applications, and that we must interpret the clause, as to this part, to mean that whenever thereafter it shall happen that any by-law has been quashed, the costs of the application to quash it shall be paid by the council. But I admit that the

clause is so worded as to give much support to the claim made in this case to recover the costs of an application disposed of before the passing of the act. Our opinion, however, is against it.

Rule discharged—but not with costs.

ELIZABETH BLOOMLEY V. GRINTON & WATKINS.

Where an agreement under seal, but of a nature not requiring a seal, was executed by one of two partners in the name of the firm, and the partner not executing afterwards acted under, and received the benefit of it, such agreement was sustained as his deed: and it was held, that he could not be allowed to dispute the authority by which it was executed in his name.

The plaintiff sued in covenant, setting out that by a deed poll, made by the defendants on the 19th of August, 1850, under the name, style, designation, and firm of Grinton & Watkins, sealed with the seal of the defendants, (of which deed the plaintiff excused herself from making profert by averring that it was lost). The defendants covenanted and agreed with the plaintiff to take from her a certain quantity of castings, machinery, and other goods of the plaintiff, specified in the said deed, at certain prices, and in a certain manner specified in the deed, amounting at such rates to a large sum—viz., 500*l.*—and to pay the plaintiff therefor, after deducting a reasonable sum for carrying the same to Dundas, by furnishing the plaintiff, within one month from the date of the said deed poll—to wit, on or before the 19th of September, 1850—four promissory notes of the defendants, to be payable, with interest, at certain periods specified in the agreement, according to the descriptions of castings and other goods.

The plaintiff then averred that she did sell and deliver to the defendants the castings, &c., referred to, according to the agreement; yet that the defendants had not given their notes.

In a second count the plaintiff declared, that on accounting the defendants were found indebted to the plaintiff in 200*l.*; and that, to discharge the same, they sold and assigned to the plaintiff certain quantities of castings, and other goods; and that the plaintiff being so possessed of

such castings, &c., the defendants, on the said 19th of August, 1850, by their deed poll made by them under the style and firm of Grinton & Watkins, and sealed with the seals of the defendants, covenanted, &c., (stating the agreement as in the first count, and the delivery of castings, &c., referred to in the agreement, and the failure of the defendants to furnish notes according to their contract).

The defendants pleaded separately *non est factum* in regard to the deed declared on each count.

2ndly, That the plaintiff did not sell and deliver to the defendants the said castings, machinery, goods, and chattels, by the plaintiff in the declaration alleged to have been sold and delivered to them, in manner and form, &c.

At the trial, before McLean, J., at Woodstock, an agreement was produced purporting to be made between the plaintiff and "Thomas Grinton and William Watkins," in which it was recited that the plaintiff had all the castings in her possession lately used in the saw-mill formerly owned by Edward Bloomley, and all the new iron and brass castings bought from Gartshore & Co., of Dundas, as per invoice to Messrs. Grinton & Watkins up to that day: and by the agreement Grinton & Watkins agreed to purchase all the articles enumerated above from the now plaintiff, on the conditions which were stated in the declaration.

This deed had the signature "Grinton & Watkins" at the foot of it, and one seal set opposite to these names. The subscribing witness swore that he had prepared the agreement, but that Watkins would not sign it till he had consulted Grinton: that they both afterwards examined the writing together, and that Grinton desired Watkins to execute it for them jointly: and that, after that, Watkins subscribed the instrument and delivered it in the name of himself and Grinton; but that Grinton was not at the time present. It was proved that the defendants got the castings and other things, in pursuance of the agreement: and that Grinton afterwards, when he and Watkins were requested to give notes for the price, said he was willing to give them, according to the agreement, for the amount specified in a certain account, but not otherwise; and the plaintiff would

not accept such notes. It was proved also, that Grinton himself took down to Dundas a load of the castings sold to him and Watkins under that agreement; and that other portions of it were transported thither by teamsters in the employment of him and Watkins. Before the agreement the defendants had been jointly concerned in carrying on business at the saw-mill.

It was objected by the defendant's counsel that the deed could not be treated as the deed of Grinton, being signed by Watkins in his absence, and not under any written authority from him. And, secondly, that there was nothing to shew for what amount the defendants were to give their notes. The learned judge overruled the second objection, but was inclined to think the first fatal. He allowed a verdict however to be given for the plaintiff, subject to the opinion of the Court upon it; and the jury found for the plaintiff 142*l.* 6*s.*

Blevins obtained a rule nisi for a new trial on the law and evidence, and for misdirection, either as to both defendants, or as to Grinton. He cited *Ball v. Dunsterville et al.*, 4 T. R. 313; *Burn v. Burn*, 3 Ves. 578; *Duncan v. Lowndes & Bateman*, 3 Camp. 478.

Read shewed cause, and cited *Harrison v. Jackson et al.*, 7 T. R. 207; *Thomason et al. v. Frere et al.*, 10 East. 418; *Steiglitz et al. v. Egginton et al.*, Holt N. P. C. 141; *Brutton v. Burton & Mills*, 1 Chy. Rep. 707; *Elliot et al. v. Davis*, 2 B. & P. 338.

ROBINSON, C. J., delivered the judgment of the court.

As regards the legal question, whether the deed can be held to be the deed of Grinton, no doubt mere parol authority to execute such a deed would not suffice; neither would parol assent or ratification afterwards make it the deed of Grinton; because, where the ratification is not coupled with any act done under the agreement it can do no more than shew a probable previous assent by parol.

The case of *Ball v. Dunsterville*, 4 T. R. 313, cannot help in this case, because the decision there was founded on the fact that the partner who did not execute in person was present, when the other partner executed in his name.

Here, however, we have the case of an agreement under seal executed by one of two partners in the joint name—that is, in the name of the firm; an agreement too of a nature that might just as well have been made without a seal; and there is not only evidence of subsequent verbal recognitions of the agreement, but there is evidence that Grinton acted under the agreement, and received the benefit of it as if it were valid, for he got portions of the castings mentioned in it, and removed them to Dundas. The case of *Brutton v. Burton & Mills*, 1 Ch. Rep. 707, goes far, I think, to sustain this as the deed of Grinton, under such circumstances, because the agreement was of that kind that a seal was of no consequence to its validity; and when Grinton adopted and acted under it, and availed himself of it, he cannot, in our opinion, be allowed to dispute the authority by which it was executed in his name. In *Burnett v. Lynch*, 8 D. & R. 368, Mr. Justice Bayley says, If a party has taken under a deed all the interest which the deed is calculated to give, it is not competent for him to dispute the due execution of it.”

We see no other ground on which the plaintiff's right to recover can be questioned, considering the issues joined.

Rule discharged.

PLANT V. STONE.

Where the plaintiff and defendant settled the suit without the intervention of the plaintiff's attorney, who afterwards went on and took a verdict: *Held*, that such a verdict must be set aside, with costs to be paid by the attorney, it not appearing sufficiently, under the facts stated below, that there was any collusion between the plaintiff and defendant to deprive him of his costs.

This suit was instituted before the 7th of July, 1851.

On that day the plaintiff went to the defendant to obtain a settlement, several payments having been made by the defendant before action brought. A balance was agreed upon of 94*l.* 19*s.* 6*d.*, as due by the defendant, which was then paid. Costs were spoken of, and the defendant paid the plaintiff 3*l.* 15*s.* for costs, which the plaintiff informed him afterwards he had paid over to the attorney.

The plaintiff, on the same day, executed a sealed release, in the usual general terms, from this action, and all other demands.

The defendant heard no more of this suit till he was served with a notice of trial by a clerk of the plaintiff's attorney, and informed the clerk that he had settled the suit, and shewed him the release; and on the 22nd of September, 1851, he obtained from the plaintiff a written direction to his attorney to stay further proceedings. The cause, however, was entered for trial at Perth, and no proper pleas had been pleaded, and a verdict for 137*l.* was given against the defendant; the record having been entered on the 29th of September, 1851.

On the 30th of September, 1851, the defendant served the plaintiff's attorney with a notice that he would move to stay all proceedings taken after notice was given of the settlement and release.

In Michaelmas term, *Richards*, for the defendant, obtained a rule nisi, on the plaintiff or his attorney, to shew cause why all proceedings since the 7th of July, 1851, or the notice of trial and all subsequent proceedings, or the passing and entering of the Nisi Prius record for trial, and all subsequent proceedings, or the verdict and assessment of damages, should not be set aside, and all further proceedings stayed, and why the plaintiff's attorney should not pay the costs of this application, on the ground that the action had been finally settled on the 7th of July, and the plaintiff had agreed to stay proceedings, and had given a release, of which notice was given to the plaintiff's attorney before trial, and on the ground that the plaintiff had before the trial given instructions to his attorney to stay proceedings.

The plaintiff's attorney filed affidavits, shewing that, on the 22nd of April, 1851, he had served notice of trial and assessment on the defendant; that on the 26th of April, 1851, the plaintiff sent him 2*l.* 10*s.* on account of his costs telling him at the same time that he had seen the defendant and made arrangements with him, that he (the attorney) was to take no further steps in the suit, and that he, the plaintiff, would settle with him for the balance of

his costs, as soon as he should get through with his saw-log business.

He admitted also, that on the 25th of September, 1851, he received from the plaintiff a written notice of the release, and directions to proceed no further. On the 19th of September, 1851, he had been notified by a third party that the debt was settled, and that in a short time he would get his costs, through an order from the plaintiff on a firm which had payments to make to him. On the 19th of September, notice of trial was served, just before the above notice was sent to the plaintiff's attorney.

The attorney swore that, in consequence of the plaintiff's instructions, sent on the 26th of April, 1851, he did not proceed at the Spring assizes; that in June a brother-in-law of the plaintiff asked the deponent for the notes which had been sued upon; that this person, in answer to an inquiry of the deponent's, told him the plaintiff had not settled with Stone yet, and wanted the deponent to advise him what to do; that he told the messenger to tell the plaintiff that the cause would go unless he was instructed to the contrary; that *he did not see* the plaintiff from the 22nd of April till after the trial on the 30th September, when he told the plaintiff he had probably thrown himself in for the costs; that the plaintiff then said he had settled with the defendant who was to pay the costs, and that the deponent must look to him; that he *believed* the plea filed for the defendant was in the writing of Mr. Merrick, in whose office the plaintiff stated the release was given, and also the notice of the 22nd of September, 1851; that he suspected from *this that something* unfair was intended, and that the plea was filed for delay that he was apprehensive that Merrick was practising a deception on the plaintiff, or that the plaintiff and he were colluding to deprive the deponent of his costs, and thought it better to proceed. He swore that he had taken no steps on the verdict; that he had no desire to put the defendant to unnecessary costs, and that no proceeding was taken against the defendant but with a view to the plaintiff's interests.

Freeland shewed cause, and cited *Nelson v. Wilson*, 6

Bing. 516 ; Cole v. Bennett, 6 Price, 15 ; Clark v. Smith, 1 D. & L. 960 ; 8 Jur. 406, S. C.

Richards, contra, cited *Jordan v. Hunt*, 3 Dowl. 666 ; *Quested v. Callis*, 10 M. & W. 18 ; *McPherson v. Allsop*, 8 L. J., N. S. ; Exch. 262 ; *Francis, a pauper, v. Webb*, 7 C. B. 731.

ROBINSON, C. J., delivered the judgment of the court.

The affidavit of the attorney is inconsistent in this, that he swears that he is decidedly of opinion that the plaintiff has fraudulently colluded with *the defendant* to deprive him of his costs, and, a little after, that he is of opinion that the defendant had no personal knowledge of any fraudulent collusion for the purpose of depriving the plaintiff's attorney of his costs, but that Merrick was the legal adviser of the defendant, and counselled and promoted *the plaintiff's collusive conduct*.

There is really no proof of fraudulent collusion to cheat the plaintiff's attorney of his costs ; nothing but an assertion that the attorney suspected it, and therefore persisted in going on in the face of a sealed release given by his client, which was shewn to him ; and he expressly swears that he does not suspect the defendant of any fraudulent collusion, but imagined that a third party was contriving with his client to deprive him of his costs.

So early as on the 26th of April, 1851, the plaintiff, as he admits, sent him 2*l.* 10*s.* on account of his costs, and told him he had settled with the defendant, and would pay him the balance of his costs. He had no fair pretence for carrying on the suit after that ; and it would be impossible, under any circumstances, that we could allow this verdict to stand, for the attorney did not content himself with asking for nominal damages—if it would have been right, under the circumstances, that he should have taken a verdict of that kind to enable him to recover his costs—but he took a verdict for 137*l.*, when he knew the debt had been settled, and that his client claimed nothing.

We make absolute the rule for setting aside the verdict, with costs of this application to be paid by the plaintiff's attorney. We do not go further back, because, if the

defendant meant to object to what was done in April, 1851, or at any time between that and the trial, as being irregular or contrary to good faith, he should have applied at the time, and not allowed the proceedings to go on.

Rule absolute.

CASWELL ET AL. ASSIGNEES OF THE SHERIFF OF OXFORD, V.
CATTON ET AL.

Action on a replevin bond, assigning as a breach that the suit was not prosecuted with effect and without delay. The defendants pleaded that an action was commenced and prosecuted without delay, according to the true intent and meaning of the condition, and to this the plaintiffs replied, that after the commencement of the action an unreasonably long time was allowed to elapse without taking any further step therein, adding a special traverse of the due diligence alleged.

Held, that under these pleadings the defendants should have been allowed to give evidence of circumstances, shewing a reason for a delay of more than a year after the writ of replevin sued out.

This was an action upon a replevin bond—Catton being principal, and the two other defendants his sureties in the bond.

The condition was that if Catton should prosecute his suit in replevin *with effect and without delay* against the plaintiffs in this suit, and should make a return of the goods distrained, if return should be adjudged by law, then the obligation should be void.

The plaintiffs charged as the breach, that Catton did not prosecute his aforesaid suit with effect and without delay, nor did he make a return of the said goods or any part thereof, according to the form and effect of the said writing obligatory.

One of the pleas was, that the defendant Catton, immediately after the making of the said bond, and without delay, and before the commencement of this suit—viz., on the 13th of August, 1849—commenced an action in the Queen's Bench against these plaintiffs for the trespass, &c., in the condition mentioned, *and from thence hitherto* hath prosecuted the said suit without delay against the said Caswell and Greenall, according to the terms, true intent and meaning of the said condition; and that the said action from thence hitherto has been, and at the commencement of this suit was, and still is pending and undetermined.

The plaintiffs replied to this plea, that Catton, after having commenced his action of replevin, allowed an unreasonably long time—to wit, one year—to elapse, without taking any further step in or towards the prosecution thereof, although he reasonably might and could have proceeded within a much shorter period—viz, within one month; adding a special traverse of the due diligence averred in the plea.

At the trial, at Woodstock, before McLean, J., it was proved that the defendant filed appearance in the action of replevin on the 12th of September, 1850; declaration was filed on the same day; pleas filed on the 20th of September, 1850; replication on the 23rd of September; Nisi Prius record passed on the 30th of September, 1850; re-passed on the 25th of March, 1851.

The defendants' counsel proposed to call a witness to prove a reason for the delay of more than a year after the writ of replevin was sued out, which was on the 13th of August, 1849, before any further step was taken; but the learned judge held that no evidence of the description of that offered (which was, that there had been some mistake on the part of a person supposed to be the attorney of the present plaintiffs) could excuse the delay, for that the condition in regard to the delay was in fact broken, whatever might have been the cause; that no excuse was set up in the pleadings: but the defendants allege, on the contrary, that Catton did proceed in the suit without delay, which the evidence disproved.

It was admitted on the defendants' part that after the Nisi Prius record was passed in September, 1850, Catton was prevented from going to trial by the loss of some papers in the Crown office, which loss was not discovered in time to be supplied by other testimony at the same assizes; that at the following court the cause was tried without those papers, a witness having been subpoenaed from the office in Toronto to account for their non-production.

The learned judge directed a verdict for the plaintiffs.

Hagarty, Q. C., obtained a rule nisi for a new trial on the ground of misdirection, the rejection of legal evidence,

and on the law and evidence. He cited Jackson v. Hanson, 8 M. & W. 477; Axford v. Perrett, 4 Bing. 586.

Leith, shewed cause, and cited Gent v. Cutts, 12 Jur. Q. B. 113; Harrison v. Wardle, 5 B. & Ad. 146; 2 Nev. & M. 703, S. C.

ROBINSON, C. J., delivered the judgment of the court.

The case was taken, we think, too strictly against the defendants at the trial. Delay means something more, as used in the condition of a replevin bond, than mere lapse of time. The substance of the issue was, whether the person replevying had prosecuted his suit with reasonable diligence or had been guilty of laches; or, as Lord Denham expressed himself, in Harrison v. Wardle, 5 B. & Ad. 155, "guilty of delay in the suit." It is a question of due diligence being used. In Jackson v. Hanson, 8 M. & W. 487, Parke, Baron, says the object of the bond is, "that the question whether the goods were rightly taken should be properly litigated in the ordinary way, but with *reasonable speed*." If so, then the question must be whether due diligence has been used, or whether there has been unreasonable delay.

The defendants' plea indeed in this case is, that Catton prosecuted his suit without delay, *according to the true intent and meaning of the condition*, which meaning we consider to be, that he shall not be guilty of laches.

The plaintiffs reply, that after bringing his action, he allowed an unreasonably long time to elapse without taking any farther step, although he reasonably might and could have proceeded within a much shorter period; and he traverses specially that he *used due diligence*. This shews, at least, that the plaintiffs understood the question to be about due diligence, rather than upon mere lapse of time, which might or might not, according to circumstances, have shewn a want of due diligence. It was not necessary, we think, that the defendants should have pleaded the excuse for the lapse of time; it was involved in the issue joined upon the question of due diligence.

If, for instance, Catton had forborne for a time to go on with the suit at the instance of the avowants themselves, and with the assent of the parties to the bond; or if the

defendant in the replevin suit had put off the trial at the assizes upon affidavit; or if both parties had been ready to try, but the judge had been obliged from press of business to make the cause a *remanet*; in either of these cases there would have been no delay within the true intent and meaning of the bond. Whether there had been such delay, could not be determined without hearing all the circumstances, and we think therefore the evidence which was offered on that point should have been received, although when it is all heard it may lead to a result unfavorable to the defendants. There should therefore be a new trial without costs.

Rule absolute.(a)

DOE DEM. MEYERS V. MEYERS.

The plaintiff made title under a purchase at sheriff's sale, and produced the sheriff's deed, under which he had held possession, by his tenants, for several years. The defendant, being the heir of the defendant in the original suit, entered; and, on action brought, objected that there were goods of his ancestor, which might have been seized; and that the plaintiff had not proved a *fi. fa.* goods returned *nulla bona*. These objections were overruled at Nisi Prius, and, the jury having found for the plaintiff, the court afterwards refused a rule nisi for a new trial.

The plaintiff made title under a sheriff's deed, made after a sale upon a *fi. fa.* in Corby v. Peter W. Meyers. The *fi. fa.* was received by the sheriff on the 19th of November, 1839; the sale was made on the 23rd of January, 1841, and the deed was executed on the same day.

Peter Meyers died on the 11th of December, 1839, leaving a son John, who died in the summer of 1849, being then twenty-four years old; the defendant was his brother, and heir of Peter.

The plaintiff was in possession by his tenants for some years after his purchase, and then the defendant entered, and he defended himself by objecting that there were goods of Peter W. Meyers which might have been seized under the *fi. fa.* against goods, and also that the plaintiff did not shew a *fi. fa.* against goods returned *nulla bona*.

(a) See this case, ante page 282.

The learned Chief Justice of the Common Pleas, before whom the cause was tried, overruled the objections, observing, that the defendant had entered upon the plaintiff's previous possession, who had enjoyed some years under his purchase: that the plaintiff had not to prove *fi. fa.* against goods returned *nulla bona*, and that proof that there were goods would not avoid the sale.

A writ of *fi. fa.* against goods, and an alias were exemplified as having issued and been returned before *fi. fa.* against lands, but no return appeared indorsed on either.

M. Vankoughnet, for the defendant, moved for a rule nisi for a new trial on the law and evidence, for misdirection, and on affidavits.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the verdict was properly rendered for the plaintiff upon the evidence. It would tend very much to shake confidence in sales by the sheriff for the satisfaction of debts, if at any distance of time a purchaser's title were to depend upon his being able to prove that there were no goods that might have been taken in execution before the lands were sold, or if his title were liable to be defeated on its being proved that there were goods which the sheriff omitted to seize. The case of *Harwood v. Philips*, *Bridgman's Reports*, 474, is very strong and express to shew that the title of a purchaser is not to be held void upon such grounds, or upon the ground that it is not shewn by him that there was an execution against goods returned *nulla bona*.

If there was any irregularity in suing out the execution against lands, it should not have been allowed to pass unnoticed for twelve years, and then first made use of as a ground for defeating the sale made under it.

Rule refused.

THE QUEEN EX REL. CLARK V. McMULLEN.

Contested election—Notice of disqualification—New evidence.

It is not necessary that the statement of facts, placed before a judge when a municipal election is questioned, should contain all the grounds on which the relator relies to entitle him to the seat, if the election should be set aside.

If there be a disqualification rendering a candidate ineligible, proper notice of it must be given at the time of election.

No new evidence will be received by the court on the examination of a decision of a judge in chambers as to a contested election.

Semble, That whether the court, or a judge before whom the relator brings his case, will go further than declare the election of the defendant void, or will proceed as well to seat the relator, is a matter of discretion not to be interfered with on appeal, (per C. J.)

This case was decided by the learned Chief Justice of the Common Pleas, in chambers.

In this term, *J. Duggan* obtained a rule on the defendant to shew cause why the judgment given there should not be altered and revised in the following manner: by striking out the part of the said judgment numbered 3rd, and adjudging instead, that the relator is entitled to be substituted in the place of the defendant McMullen, as claimed in his statement, as town councillor for the third ward of the township of York; and altered also as to the 5th part, by adjudging instead thereof, that the relator be elected and returned to the said office, he having the greatest number of votes recorded in his favour next after the defendant, who was not qualified to be elected.

And also, as to the part of the said judgment marked "lastly," by adjudging instead thereof, that the relator be admitted to the said office in the place of the defendant—on grounds disclosed in affidavits and papers filed.

In the relator's statement he claimed that he was duly elected, and ought to have been returned: his ground of objection against the defendant, who had a small majority of votes, was, that the defendant was disqualified, being at the time of his election both assessor and collector for the ward for which the election was holden, and as such, was entitled to receive fees or remuneration out of the public rates for his services, and that it was his duty to furnish and verify the roll of electors which was to govern the returning officer.

In the statement there was no allegation that any public

notice was given at the election that the defendant was ineligible, and that votes given for him would be thrown away. But in the relator's affidavit of facts accompanying his statement, he swore that before the election commenced he publicly objected that the defendant was incapacitated for the reasons first stated, and at the close of the election protested against his return.

The summons and notice indorsed both stated it to be the object of the proceedings that the relator should be declared duly elected, as having the next largest number of votes, and the defendant being disqualified.

The learned Chief Justice decided that the defendant was ineligible, and his election invalid, but that the relator was not entitled to be returned as duly elected, as claimed by him; and he determined that there should be a new election.

The ground on which he refused to seat the relator was, that his statement of objections—though it advanced a claim on his part to be returned as duly elected by reason of the defendant's being disqualified, and of his (the relator's) having the next greatest number of votes—did not allege that notice of the relator's disqualification was publicly given at the election, so that the electors, having knowledge thereof, might have been aware that their votes for him could not be legally received.

Price shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

This case was decided by the learned Chief Justice of the Common Pleas in chambers, and we have received from him the grounds and reasons of his judgment. The decision is complained of by the relator, and we are applied to under the 152nd clause of 12 Vic. ch. 81, to reverse or alter the judgment in certain particulars.

I think we should not entertain any new evidence as our ground for doing so, and that the judgment is properly examinable only upon what was before the judge. At least, that this should be the rule, unless there may be ground, under some very special circumstances, for an exception; if in any case such an exception can be allowed.

The statute 13 & 14 Vic. ch. 64, schedule A. No. 23, makes it lawful to issue the summons having both objects in view—that is, to oust the defendant, and to seat the relator—*upon the relator shewing by affidavit that the election of the defendant was invalid*; and I cannot say, therefore, that I am prepared to hold that the statement required by our rule, which is meant to be a statement of objections, must necessarily contain a statement of whatever may be thought essential for shewing the relator's right to be returned as a consequence of declaring the election of his opponent void.

But I also think, that whether the court or judge before whom the relator brings his case, will go further than declare the election of the defendant void, or will proceed to seat the relator, is in some measure a matter of discretion, with which there ought to be no interference by way of appeal, at least, unless the ground for claiming the seat be so clear under the circumstances, that it can properly be said to be a plain right. The case cited in argument, of the Queen v. Hiorns, 7 A. & 960, is an authority to shew that in the opinion of the court in a similar case in England, notice of the disqualification should be given to the electors, although there would seem strong reason for contending that the electors should be assumed to know both the fact of the person being assessor and collector, and that by law the possession of either office is a disqualification; for it is not like a disqualification for want of property, or upon some other ground which can hardly be assumed to be notorious. This difference, however, was strongly urged upon the court; and it was held notwithstanding, that in such a case, as in others, it should be shewn that the electors had notice of the disqualification.

I repeat, that I do not think that the statement, which is meant to be a notice of the specific objections on which the validity of the defendant's election is to be questioned, must necessarily contain a statement of the evidence and grounds on which the relator means to contend that, in consequence of the election of the defendant being set aside, he is entitled to be returned in his place; because that is applied for as a consequence of the expected decision

against the defendant and is not a matter in which he has any greater interest than the other inhabitants. But I do think that the learned judge before whom the case was tried had a right to be satisfied, and required indeed to be satisfied, that notice had been given of the defendant's disqualification at such a time and in such a manner, as must have made the electors aware that if they voted for that candidate, their votes would be thrown away. At the trial before the learned Chief Justice, the affidavit accompanying the statement was relied upon for proving that fact, but it did not prove it, because it might be quite consistent with the language of that affidavit that a month or a week before the election the relator had stated publicly, on same occasion unconnected with the election, and in presence of but a few or none of the electors, that this defendant was disqualified; whereas it should have been shewn that at the time of the election, and in due time, and in presence and hearing of the electors, such notice was given. The learned Chief Justice notices in his judgment the unsatisfactory nature of the proof, though perhaps he might have concluded to accept it if he had overcome the other difficulty about the statement.

As to receiving or declining to receive additional proofs after the case came on to be heard, that must always be in a great measure discretionary; and the Chief Justice having declined to receive further affidavits on that point, and considering that on what was before him it was the safer and more fair course to the electors that there should be a new election, we discharge this rule, but not with costs.

Rule discharged.

O'NEILL V. CARTER.

Guarantee—Discharge of surety—Variance.

Where the defendant became surety to the plaintiff for the rent of a certain piano hired to one H., and for its return on request; and the plaintiff afterwards sold the piano to H., taking in security a bill of exchange on England with the understanding that if the bill should be dishonoured, the sale was to be void: *Held*, that by such agreement the defendant was discharged from his guarantee.

The plaintiff charged the defendant on a guarantee for the payment of a certain rent—to wit, 2*l.* per month; the evidence shewed an agreement to pay only 1*l.* per month. *Held*, a fatal variance, notwithstanding that the amount of rent was laid under a *videlicet*.

Assumpsit—1st count special, charging that on the 1st of June, 1849, in consideration that the plaintiff would hire a piano-forte to one Hoy till the plaintiff should require it to be returned, at 2*l.* monthly rent, the defendant undertook to be answerable for the return of the piano to the plaintiff on request, and for the rent; that Hoy got the piano and kept it until the 20th of March, 1851, when the plaintiff would have requested it to be returned, but Hoy was not in the province, and that 15*l.* was then due for rent; that the defendant had notice of this, but had not procured the piano to be returned, nor paid its value, nor paid the rent.

In the 2nd count, the plaintiff set out an agreement for the hire to Hoy of a certain other piano-forte, on the terms before stated; and that the defendant guaranteed the payment of the rent; and the plaintiff averred 15*l.* due for rent, and notice to the defendant, who had not paid it.

In the 3rd count, an agreement was set out for the hire by the plaintiff to Hoy of another piano-forte, on the same terms as stated in the first count, and setting out the same guarantee from the defendant as to the return of the piano, and the payment of the rent or hire.

The plaintiff then averred a demand, on the 20th of March 1851, of the piano-forte, and non-delivery by Hoy, and that 15*l.* rent was then due; that Hoy had not paid the rent; that the defendant had notice, but had not procured the return of the piano, nor paid the rent.

Common counts were added.

4th plea to the 2nd count: That before any of the rent claimed became due, and while Hoy had the piano—viz., on the 25th of March, 1850, the plaintiff and Hoy agreed that the plaintiff should sell the piano to Hoy for 25*l.* sterling, to be paid by a bill on England; that if the bill should not be honored the sale should be void, and that in the meantime no demand should be made of the piano, or for rent; that Hoy gave the plaintiff the bill on these terms, without the defendant's consent, and that the defendant did not consent to, or ratify that agreement.

There were several other pleas, on which the plaintiff took issue.

At the trial, before Sullivan, J., at Toronto, a written guarantee by the defendant was produced and proved. It was exactly in the terms stated in the declaration as to the return; but as to the rent, all that was said was, that the defendant "agrees to be security for the rent of the same piano-forte," nothing being said in the writing either as to the amount of rent, or terms of payment.

The declaration averred that the rent was to be paid monthly, and was to be 2*l.* a month, though the amount was laid under a *videlicet*.

The learned judge directed the jury that there was no evidence of such a contract as was declared on, and recommended a verdict for the defendant, not being requested to charge specially as to each of the twenty issues in fact; but the jury gave a verdict for the plaintiff of 4*l.* 8*s.* 1½*d.*

Read obtained a rule nisi for a new trial without costs, on the ground that the verdict was perverse, being against the law and evidence and the judge's charge, and on affidavits filed.

J. Duggan shewed cause, and cited *Walton v. Mascall*, 13 M. & W. 52.

ROBINSON, C. J., delivered the judgment of the court.

It is clear that the defendant is entitled to a new trial without costs. I cannot understand why the plaintiff should have charged the defendant as upon a guarantee for payment of rent at 2*l.* a month when the papers put in by the plaintiff himself shew clearly that his charge was but 1*l.* a month. The contract being laid under a *videlicet* makes no difference as to a fact of this kind, for the guarantee is a special contract, and must be stated truly, and so material a condition of the contract as the amount of rent cannot be safely departed from under the shelter of a *videlicet*. Besides this variance, there is the total want of proof of a monthly hiring. One of the papers put in by the plaintiff himself—I mean the defendant's letter—spoke of the rent as payable quarterly. It is said on the other side, that the agreement as set out in the first count is not denied by the pleas to that count; and that is so, and may perhaps support the verdict as regards the rent, or part of it.

On the other point of the case—that is, the effect of the evidence given of the plaintiff's sale of the piano to Hoy—the learned judge was inclined to hold that the effect of it was to put an end to the guarantee, as the defendant was no party to that agreement. The law is very strict in regard to guarantees of this nature—giving to sureties in a suit at common law the advantage of such equitable considerations as would procure relief for them in equity. In case of sureties bound by bond, resort to equity is still in many cases necessary, where to allow a recovery would be against the good conscience of the case. Now here the defendant had engaged by writing not under seal, that Hoy should return the piano leased to him by the plaintiff whenever the plaintiff should demand it; and after Hoy has had it for some time, the plaintiff makes a new contract with him, and sells it to him, taking a bill of exchange on England in payment, and on the understanding that if the bill should be returned unpaid the sale was to be void. So there was a long interval during which this defendant could not have controlled the re-delivery of the piano, and the plaintiff could not have demanded it.

Under such circumstances, we think an end was put to the guarantee, and it did not revive when the bill came back dishonored.

The verdict includes the value of the piano, and there must therefore be a new trial without costs.

Rule absolute (a).

BLAIN V. OLIPHANT.

Notice of non-payment—Verbal understanding to defeat an endorser's liability.

A notice of non-payment sent to an endorser stated that the note was *duly protested* for non-payment, not saying that it was presented—held sufficient. To an action on a promissory note, by the endorsee against the endorser, the defendant pleaded, that the note was intended to have been made to the plaintiff, or order, and indorsed by him to the defendant, to secure a debt due to the defendant by the maker, but that by mistake it was made payable to the defendant or order; and that he thereupon indorsed it to the plaintiff in order to enable him to sue the maker, and on the understanding that the plaintiff should have no recourse against him as endorser; *Held*; That such an understanding would form a good defence to the action.

(a) See this case, ante 254.

Assumpsit—on a note of one Adamson, made on the 30th of October, 1849, payable in one year to the defendant, or order, at his house in the township of Toronto, for 48*l.* 12*s.* 3*d.*, with interest; indorsed by the defendant to the plaintiff; averring non-payment by Adamson, although the note was duly presented on the day when it became due, of all which the defendant had due notice.

Common counts were added.

Pleas—1st, That the defendant did not indorse the said note.

2nd, A special plea, that the note was intended to be made by Adamson to the plaintiff, or order, who was to indorse it to the defendant to secure a debt due by Adamson to the defendant; and that by mistake it was made payable to the defendant, or order, but that it was understood by the plaintiff, when the defendant indorsed it to him, that the defendant was not to be liable, and that the indorsement was only to enable the plaintiff to sue Adamson.

3rd, Denied presentment to Adamson as alleged.

4th, Denied due notice of non-payment.

5th, That the defendant indorsed for the plaintiff's accommodation; and that the plaintiff holds the note without giving value for it.

6th, That the defendant's indorsement was procured by fraud.

7th, Non-assumpsit to the common counts.

The plaintiff replied to the 2nd plea, that the indorsement was made, as in the first count mentioned, for a good and valuable consideration—to wit, for a pair of horses before then sold by the plaintiff to the defendant—traversing specially the agreement alleged by the defendant in his second plea. On the 1st, 3rd, 4th, and 7th pleas the plaintiff joined issue: to the 5th and 6th pleas he replied *de injuria*.

At the trial, before Sullivan, J., at Toronto, a protest was produced by J. Maulson, a notary public for Upper Canada, stating, that on the 2nd of November, 1850, he exhibited the note at the house of John Oliphant, in the township of Toronto, then occupied by a person of the name of Foster, being the particular place where the said note was payable,

and demanded payment from Foster, who answered that he had no funds ; wherefore he protested the same, &c.

Mr. Maulson was examined as a witness, and swore that he did present the note, as stated in his protest, at the request of Mr. Bell ; and he proved that he put in the post a notice to Oliphant on the 2nd of November, of which he produced a copy. It stated, that the note "was that day at the request of John Bell, Esquire, *duly protested* by him for non-payment ; and that the said John Bell, as holder, looks to him for payment thereof, with costs," &c.

The defendant's counsel objected that this notice was insufficient, in not stating that the note was presented, but only that it was protested for non-payment. The learned judge thought the objection fatal, but, a non-suit being declined, the case went to the jury.

The defendant gave evidence, by which he attempted to support the second plea, but the learned judge held that it did not amount to proof of that plea : the defendant's counsel contended that it nevertheless constituted a good defence, as supporting the plea denying the defendant's indorsement : it was to the effect that Adamson owed the defendant and proposed to get the plaintiff to go security with him, and sent a joint note as from him and Blain to be signed by Blain, but Blain refused to sign it and return it. Then, at the defendant's request, Adamson drew a note for Blain to indorse, which Adamson signed, but made it payable to the defendant (Oliphant), and wrote to Blain (the plaintiff) to indorse it. This was Adamson's account of the matter.

Another witness swore that Blain told him he was going to indorse for Adamson, and afterwards that he had indorsed as security for Adamson : that Adamson afterwards failed, and Blain told the same witness it was doubtful whether he would be safe or not. The defendant's counsel contended that this evidence entitled him to a verdict on the plea denying the defendant's indorsement on the note to the plaintiff.

The defendant stated, that the note being by mistake made payable to him instead of Blain, who was to indorse it, it was agreed between him and Blain that Blain should

deliver him a pair of horses, and that he should indorse this note to Blain, who might thereupon sue Adamson upon it, but was to have no recourse against him (the defendant) as indorser.

The learned judge considered that upon this statement there was clearly the *animus transferendi*, and a good consideration for the indorsement; that there was no proof of an agreement, even verbal, that there should be no recourse upon the defendant, if such agreement could avail. He directed a verdict for the plaintiff on all the issues except that on the plea denying notice of non-payment, and the issue of non-assumpsit to the common counts; and for the defendants on those two issues.

The jury gave a general verdict for the plaintiff, 56*l.* 17*s.* 6*d.*

Cameron, Q. C., obtained a rule nisi for a new trial on the ground of misdirection, and on the law and evidence: he cited *Bell v. Viscount Ingestre*, 12 Q. B. R. 317; *Armstrong v. Christiani*, 5 C. B. 687; *Strange et al. v. Price*, 10 A. & E. 125; *Pike v. Street*, M. & M. 226.

Bell shewed cause, and cited *Grugeon v. Smith*, 6 A. & E. 499.

ROBINSON, C. J., delivered the judgment of the court.

We think the defendant has no reason to complain of the verdict on the issue which denied due notice of non-payment, for there the learned judge ruled in his favour, and so the case went to the jury without any misdirection that he can complain of; and we think that, under the evidence, it was right that the issue should be found, as it was, for the plaintiff, for that the terms of the notice do sufficiently imply that the note had been presented. It could not have been duly protested without presentment. The case of *Hedger v. Stevenson*, 2 M. & W. 799, and other decisions on the same point, we think, make this clear of difficulty.

Then as to the other issues: We think the learned judge was right in holding that the plaintiff was entitled to a verdict on the first issue, which denies merely the fact of indorsement; for the evidence shewed that the defendant did indorse the note to the plaintiff, with the intention, and for the purpose of transferring the property in the note to

him, and which is all that is to be considered on that plea. But upon the second plea, we think the jury, if they believed the transaction to be as there described, ought to have found for the defendant; and we apprehend that the impression, which seemed to be entertained, that an alleged verbal understanding of the kind stated in the second plea would be no defence, must have prejudiced the defendant's claim to a verdict on that plea. The case of *Pike v. Street*, M. & M. 226, which is recognized in Mr. Chitty's work as an unquestioned authority, supports such a defence where it did not rest on so clear a ground as in this case, though I speak now with reference only to the statements in the plea. *Goupy v. Harden et al.*, 7 Taunton 159, is not inconsistent with *Pike v. Street*, but rather confirms it; for the court does not say there, "you have an indorsement and nothing in writing to qualify it, and therefore the plaintiff must recover." They remark on the want of any notice to the indorsee that the indorsement was made on any particular footing. Now here what the defendant states amounts in effect to this, that the note in this case was made and indorsed by this plaintiff with a view, and for the express purpose, of rendering the plaintiff liable to this defendant as surety for the maker; whereas by the use he now attempts to make of the note, he would make the defendant liable to him as surety or guarantee for the maker, thereby reversing the position of the parties. It seems to be an exception to the general rule of evidence that parol testimony may be received of the purpose for which a note was made and indorsed, in order to shew that it was an accommodation transaction, and of such a nature that the plaintiff has no right, consistently with the intention of the parties, to hold the defendant liable to him, notwithstanding he would be *prima facie* liable on the note or bill.

Now, here in this case, though the evidence was far less precise and clear as to the real nature of the transaction than it might have been if the defendant had been careful to preserve evidence of the understanding between them; yet it does seem very strongly to lead to the conviction

that the facts must have been such in substance as the plea represents them, for one of the witnesses swears that, according to his recollection, the plaintiff told him that a small note of the defendant's to the plaintiff, which the plaintiff transferred to the witness in some transaction between them, was given for a balance due by the defendant to the plaintiff for an excess of the price of the horses above the amount of the note, from which it may be reasonably inferred that the plaintiff, acknowledging it to have been the intention and understanding that he was to become liable for the debt due by Adamson, made over the horses spoken of, which the other was willing to take in satisfaction, agreeing to pay a small sum above the note to make up the price which the plaintiff was willing to take for the horses; and then, as payee of the note, he indorsed it to the plaintiff, with the actual intention of transferring it, and in order that the plaintiff, as indorsee, might recover the amount from Adamson, the maker; but with the distinct understanding, that although the defendant's name necessarily stood on the note as first indorser, because he had been by mistake made the payee, yet that the plaintiff was to take his remedy against the maker, only and not against this defendant.

If these really were the facts, then the effect of this verdict would be to enable the plaintiff to recover back, not only the value of his horses, which he had paid on account of the note, and which may, without any violation of the truth, be called a sale, as it is in this plea, but to recover also the amount of the small note which has been already paid to him.

We concur in granting a new trial, with costs to abide the event.

Rule absolute.

CORBETT, SHERIFF, v. HOPKIRK.

Sheriff—Bond of indemnity—Form of—Estoppel—Void condition—Liability of defendant.

The sheriff, holding executions against the defendant at the suit of different parties, took from him a bond reciting that he had seized his goods, and indemnifying the sheriff "against any loss, damage, or liability, which may be incurred by reason of the execution, wrongful execution, or non-execution of the said writ." The sheriff afterwards sold the goods, contrary to the defendant's wish, who informed him that they belonged to one G. —G. brought trover against the sheriff, proved a *bona fide* bill of sale, recovered the value of the goods, and registered his judgment. The sheriff then sued the defendant on his bond.

Held first, that the defendant was not estopped by the recital from denying his property in the goods.

Secondly, That although the damage accruing to the sheriff came literally within the condition of the bond, yet that the defendant, having expressly objected to the sale, would not be liable.

And semble, that such a bond would at all events be void at common law, as being an indemnity to the sheriff for disobeying the command of the writ.

The plaintiff declared on a bond made by the defendant on the 17th of May, 1849, in 210*l.* penalty; and also on another bond of the defendant, made on the 27th of June, 1849, to the plaintiff, in 250*l.* penalty; and on the common money accounts, and on an account stated.

The defendant cravedoyer of the first mentioned bond and condition which was set out as follows:—

Whereas the said Thomas A. Corbett, as sheriff, &c., hath by virtue of a *fiери facias*, issued from the Queen's Bench, to him directed, against the goods, &c., of Hopkirk (this defendant), at the suit of the Bank of Upper Canada, seized in execution the goods, &c., of the said defendant in the annexed schedule mentioned; and whereas the said sheriff hath placed the said goods in the custody of the said James Hopkirk, subject to the said sheriff's demand for the safe return thereof; and whereas also, in consideration of the said sheriff having consented to delay the sale of the said goods, and for other reasons, the above bounden James Hopkirk is desirous to indemnify and save harmless the said sheriff and his officers, from all liability and damages which may accrue to the said sheriff and his officers under such writ. Now the condition is such, that if the above bounden James Hopkirk shall save and keep harmless and fully indemnified the said sheriff, his under sheriff and officers, from and against all actions and costs

and damages arising therefrom, which may be brought for or by reason of the said sheriff or his officers entering or re-entering upon any lands, &c., in order to obtain such goods, &c., and also shall save and keep indemnified the said sheriff, his under sheriff, and officers, "from and against all other loss, damage, or liability, which may be incurred by reason of the execution wrongful execution, or non-execution of the said writ: then and in such case this obligation to be void," &c.

And the defendant pleaded that to whatever extent the plaintiff had been damnified by or by means of anything in this condition, he had been damnified of his own wrong, and through his own means and default.

2ndly. As to the second count, the defendant cravedoyer of the bond and condition mentioned in it, and set out the condition, which recited a *fi. fa.* delivered to the sheriff in a suit of Gildersleeve against Hopkirk, whereupon an exactly similar bond in all respects was entered into as in regard to the *fi. fa.* of the Bank of Upper Canada; the recital and condition being *mutatis mutandis*, in the same words. And the defendant as to this also pleaded, that if the sheriff had been damnified it had been of his own wrong:—he pleaded also *non assumpsit* to the common counts.

The plaintiff replied to the first plea and to the second plea, traversing that he was damnified of his own wrong or by his own default. Then the plaintiff assigned breaches in regard to the first bond, setting out in substance that on the 1st of July, 1850, he proceeded to execute the *fi. fa.* at the suit of the Bank of Upper Canada, and sold the goods referred to in the condition of the bond: that afterwards Mr. Gildersleeve brought trover against him, as for a wrongful conversion of such goods, claiming them as his and recovered damages against him—viz., 240*l.* 12*s.* 9*d.*—and registered his judgment, which forms a charge upon the plaintiff's land; and that the defendant had neglected and refused to indemnify him from and against the liability so incurred by the plaintiff by reason of the execution of the said writ.

And as to the bond in the second count, the plaintiff suggested as a breach, that on the 1st July, 1850, he sold the goods referred to in the condition thereof under the writ of *fi. fa.* of Gildersleeve against Hopkirk : that Gildersleeve sued him in trover for selling the goods as for a wrongful conversion, claiming the goods as his : and the remainder of the suggestion was precisely to the same effect as in regard to the first bond.

At the trial, before Macaulay, C. J., at Kingston, the plaintiff proved that he had writs of *feri facias* in his hands against the defendant's goods before these bonds were given ; one at the suit of the Bank of Upper Canada, another at the suit of Gildersleeve, and a third at the suit of another creditor. He had seized the defendant's goods, and Mr. Gildersleeve claimed them as his under a bill of sale which had been given to him by the defendant : the defendant desired delay, expecting to be able to make some arrangement with the Bank of Upper Canada, whose execution was first. On that occasion these bonds were given, which the sheriff's officer swore were taken in a form different from the usual form ; but how this happened he did not explain.

The goods were sold in August, 1849, and brought enough money to satisfy the executions of the Bank and of Mr. Gildersleeve, and to pay something on account of the third.

Gildersleeve brought trover against this plaintiff for selling his goods, and recovered a verdict for their value.

The sheriff proved that the judgment entered on this verdict was registered ; and that he had real estates which were thus charged with a judgment debt, amounting, with interest, to 251*l.* 8*s.* 7*d.* He gave no other proof of damage.

On the defendant's part it was proved that the goods were all forthcoming according to the condition of the bonds : that he had from the first notified the sheriff that the goods were not his, but belonged to Gildersleeve, and objected to their being sold on the executions ; but that the sheriff insisted that he must sell, as the execution creditors were urgent ; and at one time he stated that he was indemnified by the solicitor for the Bank, though afterwards, at the sale,

he said he was not indemnified. It was clear that the sheriff was unwilling to have sold the goods if by any means it could have been avoided, and also that he proceeded against Hopkirk's will, being pressed by the solicitor for the Bank, who seemed to have concluded in his own mind that the bill of sale which Gildersleeve advanced was not given *bona fide*; it was proved, however, in the subsequent action, that it was really given in good faith, in order to satisfy a debt quite distinct from that which was directed to be made by the execution afterwards obtained by Gildersleeve.

There was evidence that the sheriff, at the time of the trial of the action of trover against himself, stated that this defendant Hopkirk, had given different bonds from what he thought he had, but that he, the sheriff, had no interest in it; meaning, probably, that he was himself in no difficulty, though the unusual form in which the bonds were given might serve to protect another party who was really responsible, and not the sheriff.

The Bank solicitor swore that he had never indemnified the sheriff, but had several times urged him to sell, conceiving that the bill of sale could not hold the property. It was proved that the defendant Hopkirk, after the sale, insisted on the balance above the first two executions being paid over towards satisfaction of the third, saying to the sheriff's officer that it was the proceeds of his goods, and he did not see what right the sheriff could have to withhold it.

A letter was also put in, written by Hopkirk to the Bank a few days before the sale, in which, while requesting indulgence, he offered to give the Bank an assignment of his furniture in further security, thereby acting as if he still owned it.

By this and other evidence, the sheriff, (plaintiff in this cause) endeavoured to establish that he had been led by Hopkirk's conduct and assertions to the conclusion that his bill of sale given to Gildersleeve was not a valid assignment, and was therefore induced to sell in disregard of it, and so subjected himself to Gildersleeve's action.

The learned judge directed the jury that the breaches suggested were proved; that the defence was, that the plaintiff knew of Gildersleeve's bill of sale before he sold, and so acted in the matter with his eyes open, but that this defence seemed not properly brought out by the pleadings; that a question arose as to the proper construction of the condition in the bonds sued on—that is, whether it could be taken to guarantee the defendant's title to the goods, as well as their being forthcoming for sale when required—but the words were very ample, and strong, to operate as an estoppel against the defendant denying that the goods were his, though probably the bonds were not in fact given with that intention, for he recites that the goods are his, and becomes answerable for them;—that the sale of the goods, as they have been determined to have belonged at that time to Mr. Gildersleeve, was “a wrongful execution of the writ,” and so was within the words of the condition to save the plaintiff harmless. Though entertaining doubt, the learned Chief Justice ruled in favour of the plaintiff, on the ground that the defendant was estopped by the condition of his bond from shewing that the goods seized were not his, and had indemnified the plaintiff for selling them as his.

A verdict was given for the plaintiff on the first and second counts, with 1*s.* damages for detention of the debt; and damages assessed at 251*l.* 8*s.* 7*d.* on the breaches: and for the defendants on the common counts.

Henderson obtained a rule nisi for a new trial on the law and evidence and for misdirection; or to arrest the judgment. He cited *Bates v. Wingfield*, 2 Nev. & M. 831; *Wright et al. v. Lord Verney*, 3 Doug. 240; *McDonald v. May et al.*, 5 U. C. R. 68.

Vankoughnet, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

This case being before us on a motion for a new trial, as well as in the alternative, to arrest the judgment, we have been obliged to consider what appeared in evidence on the trial, as well as what appeared on the record, though we must confine our view to the record in disposing of the application for arresting the judgment.

We thus see on what occasion, and under what circumstances, and with what views, the bonds sued on were given; and we find it explained, though it must be confessed not satisfactorily, how it happened that a form of bond was used on the occasion so obviously ill suited to the purpose which the parties must have had in view. The goods of this defendant, Mr. Hopkirk, had been seized by the sheriff under one or more writs of *fiery facias*; and it appears that, to prevent the necessity of the sheriff removing the goods before the sale, and also to make the sheriff feel safe in granting him some indulgence as to time, Hopkirk was required to give security that the goods should be forthcoming when required, or, in the common language of this country, to receipt the goods.

There is no ground afforded by the statements of any of the witnesses for imagining that anything else was intended, and yet a form of bond was adopted by the sheriff's officer, and placed before Mr. Hopkirk for execution, which he must surely have signed, without paying much attention to what he was doing, for the bond and condition give assurances of indemnity not only quite unnecessary, considering the purpose for which these bonds were given, but evidently improper, considering the relative position of the parties; and this does not seem to have been owing to any confusion of ideas, or want of thought on the part of an attorney or his clerk, or other person acting for the sheriff hastily in this particular case, for the bonds which Mr. Hopkirk executed are both printed, and are according to a form that seems to have been settled by some one as proper to be generally used where the sheriff has to take security from execution debtors for the safe custody and giving up of their goods seized in execution, which the sheriff may intend to leave in their possession till the sale. The recital is singular in one respect, for it states that, in consideration that the sheriff had seized the goods and allowed them to remain in Hopkirk's possession, and in consideration of the sheriff having consented to delay the sale of the said goods, *and for other reasons*, Hopkirk was desirous of indemnifying the sheriff from all liability and

damages which might accrue to him under the writ. What the other reasons were, is not explained, and cannot readily be imagined; nor how they could be such reasons as could properly and legally make it requisite for the execution debtor to save the sheriff harmless against any liability or damages that could accrue to him under or (as I suppose is meant) by reason of his conduct in regard to the execution.

The proper form of such bonds of indemnity, when given either by a plaintiff who insists on a sheriff's selling, or by a claimant of the goods who urges him not to sell them, is giving in *Watson on Sheriffs*, 379, 380. These forms state precisely the purpose for which the bond is given, and the condition is in terms suited to such purpose; though the forms do also, as I am rather surprised to see, bind the party to indemnify the sheriff against all actions for, or on account, or by reason of, &c., (inserting the particular act which the sheriff has been requested to do or forbear) "or for, or by reason, or means of any other act, matter, cause, or thing whatsoever relating thereto, or to the execution or return of the said writ of *feri facias*;" which latter words, I consider, could only be taken to refer to anything which the sheriff might do upon or under the writ for carrying out the claim which the obligor had advanced, and which the sheriff, if he acts without any improper collusion, may properly treat as a well founded claim, and can prudently do so if indemnified. But in these bonds Mr. Hopkirk, the execution debtor, is made to undertake not merely that the goods shall be forthcoming when called for, and to save the sheriff harmless against all actions for entering upon any lands in order to obtain the goods for sale, but also "to save him harmless against all loss, damage, or liability, which may be incurred by reason of *the execution, wrongful execution, or non execution* of the said writ."

These are words proper enough to be used in a bond which the sheriff takes from his deputy, or from a bailiff, in order to afford him indemnity against the acts or omissions of the deputy or bailiff; because from the moment

the process is put into their hands, the sheriff is liable for their acts under the writ, and for their defaults, and should therefore be secured against their misconduct: but it is a very improper kind of security to take from an execution debtor, who has only to give security that the goods shall be forthcoming when wanted for sale. The use which the sheriff is attempting in this action to make of the bonds is, to compel the defendant to pay him a large amount of money, which has been recovered by judgment against him by a third party for having sold the goods in question in disregard of a claim which such party had set up, and has since established, to the legal ownership of the goods, under an assignment made by Mr. Hopkirk himself before they were bound by the execution.

It is plain on the evidence, that it could not have been in the contemplation of the parties that the bond was to afford indemnity to the sheriff against any damage or liability of that kind. It was the plaintiff in the execution, and not the defendant, who should, in the common course of things, have indemnified the sheriff against the claim of any third party to the goods; and it appears from the evidence that the sheriff, when he persisted in selling, was relying, or at least professed that he was relying, on an understanding between him and the plaintiff's solicitor, that he would be saved harmless if he sold the goods under that writ, as they, and not the defendant, insisted he should do. We do not usually find defendants insisting on the sheriff selling their goods, and indemnifying him against the consequences, though there may be a case supposed in which a defendant might take that part, and not unnaturally or improperly, under the peculiar circumstances. If this defendant, for instance, had been constrained by duress, or procured by some fraud to make a bill of sale, which he afterwards resolved to repudiate, he might prefer to have them sold to satisfy his just debts, rather than that the assignee under the bill of sale should hold them; and if he had urged the sheriff to act accordingly, he might reasonably have been asked to indemnify the sheriff in thus venturing to disregard the apparent title of the person claiming as

assignee ; but this was not shewn at the trial to be a case of that kind : on the contrary, it was proved that Hopkirk, while he produced the goods, as he was bound to do, objected to their being sold under the execution, notifying the sheriff that they were not his goods, but were really the property of Mr. Gildersleeve, to whom he had assigned them in satisfaction of a just debt ; and there seems to be no doubt that the sale was made by the sheriff against Hopkirk's will, and not by his wish or procurement, and therefore an act for which he cannot be supposed to have intended to indemnify the sheriff.

It seems rather strange that under such circumstances the defendant did not at once apply to the court, on affidavit, to stay proceedings in this action, if he had in truth done all which it was the real object of the bond to secure. In regard to such bonds, taking from the suitors by the officer of the court in the course of legal proceedings, it might be urged that the court should interpose to prevent any unjust advantage being taken ; and at least the court would have put the sheriff to answer the defendant's allegations as to the object for which the bond was given. Instead of that the defendant has pleaded, and it seemed to the learned judge at the trial that his pleas were not calculated to admit his defence.

That is the point to be first considered by us on the motion for a new trial. He has defended himself only by saying, that if the sheriff has been damnified by means of anything in the condition of the bond, he has been damnified of his own wrong, and through his own means and default. How does the evidence support that ? The plaintiff assigns as a breach of the bond that he sold the goods as being the defendant's, and liable to the execution (not saying that he sold them at the instance or request of the defendant : that Gildersleeve sued him as for a wrongful conversion, and recovered damages : and that this defendant has not indemnified him against this damage so incurred by him, the sheriff, by reason of the execution of the writ.

Now, first, is this damage within the legal effect of the condition ?

2ndly. Did the evidence shew that the sheriff by his own fault brought it upon himself?

As to the *first* point, it certainly was a damage arising from "*the execution of the writ*," and from "*the wrongful execution of the writ*," and so comes literally within two of the contingencies against which the defendant by his bond indemnified the sheriff.

But, as to the second point, I am inclined to think that the selling the goods was, and so far as the defendant was concerned, the voluntary act of the sheriff himself—not an act done in the defendant's favour, or for his benefit, or at his request; but, on the contrary, done against his desire, and notwithstanding his assurance that the goods belonged to Gildersleeve, and could not therefore be sold to satisfy the execution. The sheriff could not, I think, act against the obligor's wish, and in defiance of his information, and yet claim to be indemnified by him under the bond. If that was really the position of the parties in the opinion of the jury, (I mean as regards the facts proved), then, in my opinion, they should have found that the sheriff, in acting against the wish of the defendant, and in disregard of his notice or information, was damnified of his own wrong, and through his own means: that he acted at his own peril, and took the risk on himself; and that he must either bear the consequences, or must look to those for indemnity for whose benefit and at whose instance he committed the act.

According to the letter of these two bonds, there was really nothing which the sheriff could afterwards have done or omitted to do upon the executions for which he might not have called upon the defendant to save him harmless, if we must look only to the words of the condition, and pay no regard to the reason of the thing. If there had been no claim set up by any person to the goods, and the sheriff had improperly put them all up in one lot, when only three persons were present, and had sold them for two pounds, and the plaintiff in the execution had sued him and recovered their value, that would have been a loss or damage by reason of *the wrongful execution of the writ*,

and the sheriff might say that by the letter of the bond the defendant was bound to indemnify him against the consequences, although the defendant might have had no hand in it, or might have remonstrated against it, and although he would be as great a sufferer by the sheriff's misconduct as the plaintiff could be. In such a case, however, he would no doubt have been told that he had suffered the damage of his own wrong, and could have no claim on the obligor of the bond; and on the same principle, I think, the jury might have been told on the trial of this case that the plaintiff could not recover on the facts proved, if the evidence should satisfy them that the damage arose from something done at the instance of another party, or by the sheriff's following his own inclination against the expressed desire of the defendant, and contrary to information given by the defendant, which, if believed, might have saved the sheriff from exposing himself to Mr. Gildersleeve's action.

The learned judge at the trial took a view of the facts, which, upon fuller consideration than he had it in his power to give to the case at *Nisi Prius*, we cannot concur in, and from which we have less difficulty in dissenting, because he expressed at the time his want of confidence in the conclusion which he came to at the moment. He considered that the defendant, having executed these bonds, which recite that the sheriff had seized his goods in execution, was estopped from setting up afterwards that they were not his goods, and so that the sheriff could not be said to have acted in his own wrong, in proceeding afterwards as if they were the goods of the defendant: that the sheriff might therefore act in opposition to whatever the defendant afterwards said on that point, and yet might call on the defendant to save him harmless. We think we cannot hold that that would be a reasonable application of the doctrine of estoppel. The sheriff might, it is true, have told the defendant before the sale, "whatever you may now say about the goods not being your property, but Mr. Gildersleeve's, you have signed a bond in which you admit that I have seized your goods, and I will hold you to that admission. The execution plaintiff threatens me with an

action if I do not sell, and I shall therefore go on ; and if Mr. Gildersleeve proves them to be his goods and recovers against me, I shall come upon you." But I think the defendant might well have answered that it would be very unreasonable to expect him to bear the consequences of an act which the sheriff might allow himself to be driven into by the urgency of other parties, though he, the defendant, had no wish that it should be done, and had given the sheriff such information as shewed that it ought not to be done, and could not be done legally ; and, as to the holding the defendant estopped from telling the truth, because he had signed a bond in a printed form, filled up by the sheriff's own officer, and improperly placed before him for his signature, the defendant might well have reminded the sheriff that it would be folly in him on that pretence to shut his eyes against the truth, because the bond of the defendant could not be an estoppel upon Mr. Gildersleeve, and could not therefore affect the question of property in the goods ; and if he trusted for his protection in that which could not protect him, he would be acting in his own wrong, and unnecessarily bringing a loss upon himself. It is true that the sheriff did give evidence of conduct and declarations of the defendant, which he relied upon as being inconsistent with the fact that he had *bona fide* assigned these goods to Mr. Gildersleeve ; but this evidence could not be said to be conclusive by any means ; and at any rate, if the view which we take of the case be correct, it should have gone to the jury as evidence from which, and the other evidence, they were to decide whether the sheriff did or did not take upon himself to act against what he knew to be the defendant's wish, and the representations which the defendant made to him.

There should, we think, be a new trial without costs, for it is this part of the rule which, for obvious reasons as regards costs, the defendant may claim to have disposed of first, when there is a motion in the alternative to arrest judgment.

But, for the sake of both parties, I will state my own impression to be, that if we had found the verdict to be

such as should be sustained, considering the pleas and the evidence, we should then have been obliged to make the rule absolute for arresting the judgment; for I consider these bonds void, not under the statute 23 Hy. VI. ch. 9—for that by its language is clearly confined to cases of bonds taken for ease and favour in regard to persons in custody, to whom the sheriff should not grant indulgence irregularly, as the court decided in *Beawfage's case*, 10 Coke 99 *a*, and does not extend to engagements made to indemnify the sheriff for ease and favour shewn in regard to goods taken in execution—but I think such bonds as these are void at common law, on the principle on which the bond was held void in *Wright v. Lord Verney*, 3 Dougl. 240. The plaintiff urges that we cannot look out of the bond to inquire for what purpose, or on what occasion it was given, but must give him the full benefit of it according to its words; then if so, and we are to attend only to the language of the bond, we find that it is a bond to save the sheriff harmless against any damage he can suffer from executing, (I suppose here is meant rightfully executing,) or from wrongfully executing, or from not executing at all the Queen's writ put into his hands, and which writ it is his duty to obey and enforce to the best of his judgment according to his knowledge: in other words, the defendant tells him, "you may do whatever you will upon this writ, or disobey it altogether, and I will stand between you and all harm." Independently of the consideration of public policy, which cannot sanction the sheriff in fortifying himself by taking a preposterous engagement of that kind, the facts in this case, and the manner in which right and wrong are apparently confounded in the use attempted to be made of these bonds, shew the evil consequences that must follow from allowing the sheriff to take a security in such terms that it could be perverted to any purpose, and made use of to cover any abuse that he might choose to commit, even to the injury of both parties in the execution.

Rule absolute for new trial without costs.

HALL & PLATT V. GILMOUR.

Implied covenant—Rights of assignee and surety.

The plaintiffs were sureties to the defendant for the performance by C. of an agreement, whereby C. covenanted for himself, his executors, administrators and assigns, to build certain cottages for the sum of 1800*l.*, which the defendant covenanted to pay to C., his executors, administrators and assigns in the following manner: 800*l.* to be advanced during the progress of the work, and the remaining 1000*l.* to be paid on the completion of the agreement, by the conveyance to C. of certain specified premises. C. failed to perform his contract, and assigned it to the plaintiffs, having received 800*l.* on account. It was not shewn that the defendant was any party to the assignment.

The plaintiffs and defendant then entered into an agreement (to which C. was no party), reciting C.'s previous contract; the plaintiffs' liability as sureties for him; his non-performance and assignment to the plaintiffs; that the defendant at the plaintiffs' request had agreed to give further time for the completion of the contract; and that in consideration of the premises the plaintiffs covenanted to finish the work according to the first agreement; and the parties mutually bound themselves in 1000*l.* for the performance of this last agreement.

Held, that there was no covenant, either express or implied, on the part of the defendant to convey to the plaintiffs, or to pay them the 1000*l.* (Robinson, C. J., *dissentiente*.)

The declaration stated that, on the 30th of October 1850, by an agreement between the plaintiffs and the defendant, under their respective seals, (of which the defendant was at the time in possession, and therefore the plaintiffs could not produce it) it was recited that one George Clarke had contracted with the defendant to build five cottages for him, according to certain plans and specifications, for 1800*l.*: that Clarke had neglected to perform his contract, and was unable to do so, and at the request of the plaintiffs, on the 12th of October 1850, had assigned it to the plaintiffs to be completed by them: that the defendant had agreed with the plaintiffs to give further time for completing the work; and that the plaintiffs did covenant and agree with the defendant to finish the cottages in a workman-like manner at their own costs and charges, according to the plans, conditions, &c., which were to be performed by the said Clarke, and subject to the approval of the architect therein mentioned: and the plaintiffs averred that by the agreement as now sued upon (of the 30th of October 1850), *the defendant did covenant with the plaintiffs* to pay them for finishing the said cottages according to the terms of the said articles of agreement, at the rate at which Clarke was to have been paid for the

same. The plaintiffs then set out the amount which was to be paid to Clarke according to the first agreement, and in what manner payable; and averred that they finished the cottages to the satisfaction of the architect, of which the defendant had due notice, and that he accepted the cottages: that Clarke had received from the defendant on account of the contract as the work advanced 800*l.*: and that there remained to be paid by the defendant on the contract, on the completion thereof, 1000*l.*, which the defendant by the said agreement became bound to pay to the plaintiffs; but that he neglected and refused to pay the same according to his covenant.

In the second count the plaintiffs stated the agreement between the defendant and Clarke, and the assignment of it by Clarke to the plaintiffs, setting out in this count that Clarke, by the original agreement with the defendant, was to be paid by the defendant as follows—viz., 800*l.* as the work progressed—and that for the remaining 1000*l.*, as soon as the cottages should be completed, the defendant was to convey in fee simple to Clarke a certain cottage (one of those to be built) with the land attached thereto, as described in that agreement; and the plaintiffs averred that the defendants did by the agreement of the 30th of October 1850, “covenant with them to pay them for finishing the five cottages according to the terms of the first articles of agreement, at the rate at which Clarke was to be paid for building the same; that they had completed the cottages; that Clarke had received 800*l.*; but that the defendant, though requested, had refused to convey to the plaintiffs the cottage and land which he was to have conveyed to Clarke, according to his covenant.

The defendant pleaded *non est factum* to both counts.

The agreement between the defendant and Clarke was made on the 19th of July 1850. By it Clarke covenanted, that he, the said Clarke, his executors, administrators, or assigns, would at his own cost build the five cottages, &c.: that if he, his executors or administrators, should neglect or delay the work, and the defendant should give notice to him of such neglect or delay, then the defendant might, in

twenty days after such notice, employ others to complete the cottages if Clarke did not, and might retain what he should necessarily pay to such other persons.

Then the price and terms of payment were stated as in the second count of the declaration, and the defendant, for himself, his executors, administrators, *and assigns*, by his first agreement, covenanted with Clarke, his executors, administrators, *and assigns*, to pay to Clarke, his executors, administrators, *and assigns*, 800*l.* as the work progressed, upon the order of the architect; and that in lieu of the balance, 1000*l.*, he would, as soon as the five cottages were finished to the satisfaction of the architect, convey by deed in fee simple, a certain cottage and premises, &c. (describing the land.)

The agreement sued upon, dated the 30th of October 1850, was between these plaintiffs of the one part, and the defendant of the other part. It recited the agreement of the 19th of July 1850, and that these plaintiffs had by their bond become bound to this defendant for the due performance by Clarke of his contract: that Clarke had neglected to perform it, and was unable to finish it; "and at their request, on the 28th of October 1850, had assigned and transferred the contract to them for the purpose of completing the same:" that this defendant, at the request of the plaintiffs, had agreed to give further time for finishing the cottages.

And the plaintiffs in this agreement covenanted with the defendant, that they would at their own cost, and in a workman-like manner, finish the five cottages mentioned in the contract (of 19th July 1850) thereunto annexed, "according to the plans, specifications and conditions therein mentioned, which were to be performed by the said Clarke, and subject to the approval of the said architect therein mentioned, as by reference to the said plans, specifications and conditions will more fully appear;" and that they would complete the cottages by a certain time therein mentioned, under a penalty of 5*l.* per week for each building for the time that they might be in arrear; and that they would pay to the defendant legal interest

up the 800*l.* that had been advanced to Clarke, as damages for not completing the work according to the agreement, to be apportioned from the 1st of November following to the time of the buildings being completed and delivered up: and the parties covenanted with each other, that if any dispute should arise between them touching that agreement they should have recourse to the said annexed agreements, plans, specifications, and the above recited bond, for explanation: and for the due performance of this agreement (of the 30th of October) these parties "bind themselves each to the other in 1000*l.*"

At the trial, before Sullivan, J., at Toronto, the defendant's counsel contended, that there was no such covenant, either expressed or implied, in the agreement declared upon (that of the 30th of October 1850) as the plaintiffs had set out. The plaintiffs' counsel maintained that such a covenant was implied in that agreement. The learned judge thought it was not, and directed a non-suit.

Vankoughnet, Q. C. (with whom was *M. Vankoughnet*) obtained a rule nisi to set aside the non-suit; or for a new trial without costs; or to enter a verdict for the plaintiffs for the amount claimed. He cited *Wood v. the Copper Miners' Company*, 7 C. B. 906; *Earl of Shrewsbury v. Gould*, 2 B. & Al. 487.

Adam Wilson, Q. C., shewed cause, and cited *Randall v. Lynch*, 12 East. 179; *Seddon v. Senate*, 13 East. 63; *Webb v. Plummer*, 2 B. & Al. 749; *Stevenson's case*, 1 Leon. 324; *Plow. 308 a.*

The question was whether, taking the two agreements together, and considering the recitals of the first agreement which are contained in the second, and then taking in connexion with those recitals the language of the second deed (of October 30th 1850), the plaintiffs were warranted in stating, as they did in their declaration, "that the defendant by that deed covenanted with these plaintiffs to pay them for finishing the five cottages, according to the terms of the first articles of agreement, at the rate at which Clarke was to be paid for building the same."

ROBINSON, C. J.—I am of opinion that there is a covenant

implied on the defendant's part to pay to the plaintiffs, on their completing the cottages, the consideration which was to have been given to Clarke if he had done the work, and had not assigned the contract; otherwise the defendant would be covenanting for nothing with these plaintiffs by the last agreement, although he does expressly in that deed bind himself to the plaintiffs in 1000*l.* for the due performance of that agreement—and that 1000*l.* too, we must consider, was precisely the portion of the price which remained yet to be paid according to the original agreement. The recital in the second agreement of the payments to be made according to the first agreement, followed by a covenant of the defendant with these plaintiffs to keep his agreement, and the circumstance that by the first agreement it is provided that this defendant shall make the payment to Clarke, *or his assigns*, make the intention of the parties, as it seems to me, too clear for doubt: and then, when we find it recited in the second agreement that these plaintiffs had become the assignees of the job, it is impossible to deny that the second deed does contain not merely an implied, but an express covenant with these plaintiffs. The cases cited in the argument of *Randall v. Lynch*, *Stevenson's case*, *Seddon v. Senate*, *Webb v. Plummer*, and *Pordage v. Cole*, 1 Saund. 319 *l.*, were much less plain than the present is in favour of the plaintiffs, and in all of them the court raised an implied covenant upon what they inferred must have been the intention of the parties. I refer also to Com. Dig., Covenant A, 4.

DRAPER, J.—I think the rule should be discharged. The plaintiffs, owing to Clarke's default, had forfeited their bond to the defendant; and the defendant, by the agreement of the 30th of October 1850, agrees to extend the time, and waive the forfeiture, if they complete the buildings by certain specified days. If they had failed to do this, it is not clear to me that the defendant could not maintain an action on the bond, which apparently still stood as a security for the fulfilment of Clarke's contract, the time for performance being extended. I see no ground to imply a covenant to pay the plaintiffs, nor anything which would enable the

defendant to say that on completion of the cottages within the enlarged time he would not be liable to Clarke for the balance of 1000*l.*, as he had covenanted to pay him. The new agreement operated as a waiver or discharge of the breach of Clarke's agreement in not finishing by the time stipulated, and as giving a further day for the performance by the sureties for and on behalf of the principal, and therefore contained a good consideration for the defendant's covenant.

It is true that, in this case, the covenant made by the defendant with Clarke was with him and his assigns; but it seems to me that the word "assigns" can only be construed to apply to such persons as the law would make his assigns, and not to extend the defendant's covenant into a license to Clarke to assign the performance of what he undertook to perform to a stranger, or into a covenant by the defendant to pay such stranger. Where covenants run with the land an assignee may sue on them, though they were entered into with the grantee and his heirs only; and such covenants, though entered into with the grantee, his executors and administrators, will pass only with the land to the heirs. The law interprets the words used according to the matter to which they relate; and it seems to me it would be going against, rather than following, that rule, to give so extended a meaning to the word "assigns," when the subject matter is not of an assignable character in its own nature. And this view derives force from the consideration, that the doctrine of implied covenant to and with assignees, is confined to real property.^(a) As is said in *Spencer's* case, (5 Rep. 17, *a*), "if a man leases personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to re-deliver, and the lessee assigns over the goods, this covenant shall not bind the assignee, for it is but a personal contract, and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in a lease of personalty there is neither privity nor reversion, but merely a thing in action in the personalty, which cannot

(a) See 1 Selw. N. P., 10th Ed., 454, *note*.

bind any but the covenantor, his executors or administrators, who represent him."

If therefore the plaintiffs have any right to recover, it must be founded on the contract between themselves and the defendant; and the question is, whether they were contracting in consideration of their being his sureties and presently liable for his default, to complete, within an extended time granted by the defendant and for his benefit, what Clarke had covenanted to do; or whether they were treating him as having no longer any right or interest in the matter, and were contracting with the defendant for their own benefit, both as being relieved from their responsibility as Clarke's sureties, and as to any profit to result from finishing the contract. If this were their intention, it seems almost impossible that the defendant should not have covenanted with them to pay them what was to be paid, on the completion of the work within the extended time. If it were in fact a new contract, though founded on the former as to work to be done, prices to be paid, &c., why should both parties base it in part on the consideration of extending the time for performing the former contract? That the defendant should become bound to the plaintiffs in a penalty to fulfil what he had engaged to do with Clarke, on the fulfilment of what Clarke had engaged to do, but within the enlarged time, is, I think, easily explicable, without resorting to a construction that it meant that he should fulfil *to them*, the now plaintiffs, what he was under a penalty to fulfil to Clarke himself. I think they may properly be taken to have expressed in words *all* they meant, which, as I construe these words, is, that they bound themselves to fulfil all that Clarke undertook, except as to time, of which there was an extension; and the defendant bound himself to them to accept such performance by them as a full performance by Clarke of the original agreement, and to fulfil to Clarke the undertaking of the defendant, for which Clarke's work, &c., was the consideration.

I do not think it can be maintained that there is any covenant to pay the plaintiffs 1000*l.* when the work is done.

There certainly is no such covenant expressed ; and I do not agree in the argument which was urged in support of the first count—namely, that under their second agreement reference is only to be had to the first, to ascertain the work to be done and the sum to be paid ; and that, as the plaintiffs by the second agreement covenanted to do that work at that price, an implied covenant arose on the defendant's part to pay them that price on the completion of the work. I therefore think the plaintiffs cannot recover on the first count. Nor can I bring myself to the conclusion that there is any implied covenant, (there certainly is no express one), to convey the cottage, on completion of the work. No such covenant could be implied in law, from the plaintiffs' engagement to do the work for the defendant, nor, as appears to me, from any part of the defendant's undertaking, until you come to the penalty, and that is to ensure the performance of the second agreement, which agreement is not, I think, to be implied from the clause imposing the penalty, but in the antecedent parts. Reading those alone, they shew the defendant's agreement to waive the forfeiture of the plaintiffs' bond as sureties for Clarke ; to accept the performance of the work by the plaintiffs, at an extended time, as a performance by Clarke at the time agreed on by him ; and, as a consequence, to fulfil to him whatever the defendant would have been bound to fulfil, if the work had been finished by the time first stipulated.

BURNS, J.—I see nothing in the agreement made between the plaintiffs and the defendant which justifies the first count in stating that the defendant covenanted and agreed with the plaintiffs to pay them for finishing and completing the cottages upon the terms and at the rate at which Clarke was to have been paid—that is, 1000*l.* upon the completion thereof. The defendant covenanted with Clarke to convey to him one of the cottages on the completion of the whole, in satisfaction of 1000*l.*, but he did not covenant to pay that sum in money ; and though the defendant should refuse to convey, thereby entitling Clarke to the 1000*l.*, yet I cannot see that such refusal would convert the covenant into one to pay the amount in money.

Whether the plaintiffs can maintain an action against the defendant must rest upon the point which the second count raises—namely, whether the covenant entered into by the defendant with Clarke, that he, the defendant, in lieu of the 1000*l.*, would, as soon as the said five cottages were completely finished to the satisfaction of the architect, absolutely convey by deed in fee simple all and singular one of the cottages, is to be construed as being extended by the subsequent agreement so as to give the plaintiffs a right of action. Clarke had bound himself to finish two of the cottages by the 15th of October, and the other three by the 1st of November. On the 28th of October, Clarke assigned the contract to the plaintiffs, for the purpose of their completing the same; and on the 30th they entered into the contract sued upon to complete the buildings. Now what are the considerations for which the plaintiffs entered into the contract with the defendant? The contract recites them. First—that Clarke had entered into the contract to build according to certain plans and specifications, and that the plaintiffs had become bound for his performance of the contract. Secondly—That Clarke had neglected to perform the contract, and had assigned it to the plaintiffs for the purpose of their completing the same: and thirdly—in consideration of the covenants contained on the part of the plaintiffs to finish the work, that he the defendant would extend the time for it, to enable the plaintiffs to finish and complete the contract. These are all the considerations expressed, and for these the plaintiffs covenant to finish and complete the buildings, and to furnish materials; and to do so, as far as respects two of the cottages, by the 1st of December, and the remainder by the 1st of February after. Further, the plaintiffs covenant to pay the defendant interest on the sum of 800*l.* then already advanced to Clarke on account, as damages for not completing the same according to the agreement, to be computed from the 1st of November until the buildings should be completely finished and delivered to the defendant. Both parties covenant, that in case any dispute shall arise touching the new agreement, recourse shall be had to the agreement, plans,

specifications, and the bond which the plaintiffs as sureties had entered into, for explanation. Is there, then, any implied obligation on the part of the defendant, that he will, on the completion of the buildings by the plaintiffs, convey to them the cottage and land which he had covenanted to convey to Clarke? I am at a loss to see how it can be made out that such is the case. It is perhaps true, and I rather incline to think so, that after the new agreement with the sureties, the defendant would have no remedy upon their bond as respects the non-fulfilment of the contract; and that the plaintiffs would be liable only on the new agreement. The undertaking on their part to pay the defendant interest, as damages for the non-fulfilment of the contract, combined with the extension of time given to do it, might, unless accompanied with stipulations, have operated to discharge their liability as sureties on the first agreement. These considerations would be sufficient to explain why the new agreement contained fresh covenants on the part of the plaintiffs, without supposing in any way that the plaintiffs believed or thought that it was a consequence following the fact of their binding themselves to finish the work that the defendant must be held to be liable to pay them for it.

That they had undertaken to finish and complete the contract on Clarke's behalf does not, in my opinion, prove that they necessarily become entitled to the benefit of it. If the new agreement had recited that the assignment of the contract by Clarke to them was for their benefit, as well as for completing the contract, I should then have thought the plaintiffs entitled to recover; but I do not see that we must necessarily assume, that because they entered into new covenants and did the work, therefore the defendant was bound to convey to them what he had bound himself to convey to Clarke. The recital of the assignment to the plaintiffs is simply that it was done that the plaintiffs might complete the contract. It may be that all benefit which Clarke would be entitled to would, as between Clarke and them, pass to them, unless there were stipulations to the contrary; but then, to enable them to

claim that benefit from the defendant, which is a very different question, it appears to me that he should be shewn to have assented to it in some way by the agreement. Without the defendant's assent, the plaintiffs, though bound for the due fulfilment of Clarke's contract, could not, after he had made default, have gone on with the work themselves. As I view the agreement, the defendant has limited his assent to the plaintiffs' completing the work, giving them the extended time; but did not give his assent to transfer to them his liability to convey the land and cottage. The considerations for their covenants are, I think, abundant, without at all inferring that the defendant must necessarily convey to them on the completion of the work; and the recital, that the contract had been assigned to the plaintiffs for the purpose of completing the same clearly, I think, means *completing* on the part of Clarke; and it does not mean that it was to be *completed* by the defendant to the plaintiffs. If Clarke was to sue upon the first contract, because the cottage and land were not conveyed, I do not see that the defendant could defend himself: he could not set up Clarke's default, because that was waived expressly by covenant of the defendant; and this contract, entered into between the plaintiffs and defendant, could not, that I can see from the recital of the purpose for which the contract was assigned, discharge his covenant to Clarke. I proceed in dealing with the contract between the parties to this suit upon the principle, that where they have entered into an agreement with express stipulations on both sides, not to extend that by implication, as it ought to be presumed that where they have expressed some, they expressed all the conditions by which they intended to be bound to each other. For these reasons I think the nonsuit was right.

Per Cur.—Rule discharged.

DOE DEM. TAYLOR v. PROUDFOOT.

Accidental overplus, not covered by deeds—Ejectment for, by patentee—Statute of Limitations—Discontinuance and adverse possession

The plaintiff, being the patentee of a 200 acre lot, sold to one T. the rear 50 acres, and afterwards "the front three quarters" to one K. Supposing that he had parted with all his land, he moved off the lot: it turned out, however, that, owing to an error in running the lines, a small surplus, not covered by the deeds, was left between the parts sold; and after the lapse of more than thirty years the plaintiff brought ejectment to recover this portion.

Held, That to enable the Statute of Limitations to run, it was not necessary that K. should have taken possession, imagining that he had bought all not sold to T., and intending therefore to claim and possess the part in question; but that it should have been left to the jury to say whether the plaintiff, having been in possession of the rents and profits, had not discontinued such possession, and whether such discontinuance was not more than twenty years before action brought.

This was a second trial of an action brought to recover possession of an alleged overplus between the rear fifty acres and the front three-quarters of a 200 acre lot.

At this trial, before Sullivan, J., at Toronto, it appeared that in 1807 the Crown granted the whole lot to David Taylor, describing it as a lot containing 200 acres, more or less, and giving the length of the side lines as 100 chains, and the breadth of the lot 20 chains, adding, however, the words "more or less" to each limit.

Neither Taylor nor the other owners of land in the neighbourhood were aware that there was any overplus in the lots, but assumed that they were 100 chains deep and 20 chains wide, until some years, probably many years, after the deeds were made by Taylor, on which the question in this action arose.

Some time before 1816 Taylor first sold to one Tisdale the rear fifty acres of his lot, describing it so as to confine the portion sold to 50 acres off the rear, taking the whole width of the lot—at least, it was contended that the description could have no other effect. This deed having by mistake called the lot by the wrong number, a second deed was made to Tisdale in 1830, describing the land by metes and bounds as in the first deed.

Then (in 1816) Taylor, who when he made his first deed to Tisdale was residing on the front of his lot, and still owned all that he had not sold to Tisdale, sold "the front

three quarters" to one Kemp, describing that as if it were 75 chains in depth by 20 in width, which no doubt was his impression, derived from his patent.

Having thus parted, as he supposed, with all his land—for there could be no doubt that the fifty acres which he sold to Tisdale was considered by him to be the rear quarter, though his deed called it by the name of the rear part, and the land sold to Kemp being the front three-quarters—he moved off the lot, gave up his possession to Kemp, and left that part of the country entirely; and then, after an interval of thirty-four years, he brought this action to recover a small piece, which, on an accurate survey, it turned out there was between the front three-quarters sold to Kemp and since purchased by the defendant Proudfoot, and the fifty acres first sold to Tisdale, owing to the lines over-running the 100 chains mentioned in the Crown plan of survey.

The defendant objected, *first*, that the two deeds made by Taylor were evidently meant to embrace the whole lot, and that they did by a fair construction take it all in. *Secondly*, that at any rate the lessor of the plaintiff having been once in actual occupation of the lot receiving the rents and profits, had discontinued his possession for much more than twenty years, and could not therefore now maintain this action; that he was barred by the 17th section of Wm. IV., ch. 1.

The small piece of land in question had been lying in a state of nature, not occupied or improved, and not claimed by either of the proprietors of the lot, until this defendant enclosed it a year or two ago.

The learned judge observed to the jury, that the discovery of the surplus was not made until long after Taylor had made both conveyances, and had removed altogether from the lot; that in his opinion the two deeds did not meet, and did not embrace the whole land; but that if Taylor left the land thinking that he had disposed of it all, and Kemp entered thinking that he was entitled to the whole residue not conveyed to Tisdale, and intending to take possession of the whole, then the Statute of Limitations would begin to run, and Taylor would be barred.

The jury found for the plaintiff.

Vankoughnet, Q. C., obtained a rule nisi for a new trial on the law and evidence, and for misdirection.

McNab shewed cause.

ROBINSON, C. J.—As regards either the defendant Proudfoot, or the present owner of the rear 50 acres, there would be no injustice in the plaintiff's recovery, though it seems unreasonable that he should, at this late period, seek to come in between them with his claim.

In many other instances where there has been such an overplus, contrary to the intention of the government, and unknown for many years to the grantees, it would lead to extreme hardship and inconvenience if the original proprietor could make good the claim to it, after giving conveyances which he supposed at the time would have covered the whole lot; but it does not happen that in this case Taylor's being allowed to recover it would produce inconvenience, or operate unjustly towards any one. Tisdale confined his possession to the actual 50 acres in rear; and Shaw, who had purchased from him and is now in possession, claims nothing more, and has never improved or inclosed anything beyond.

The defendant Proudfoot has clearly only a right by his deed to the front three-quarters of the lot, and can pretend no just claim to this small surplus lying between that and the rear fifty acres. But he has chosen to defend for it, and he has of course a right to take any exception that he can against the plaintiff's claim to recover.

It is very unwise in the parties to be continuing a contest about two and a-half acres of unimproved land in the rear part of a lot, when either party desiring it could properly annex it to his property by an amicable compromise, at a much less expense than he must incur by a law-suit in this court, even if successful.

Being driven to determine upon the points raised, I can not avoid saying that it appears to me the direction given to the jury was inaccurate in this, that it was stated to be a necessary part of their enquiry whether Kemp took possession of his part, imagining that all had been conveyed to

him which had not been sold to Tisdale, and intending therefore to claim and possess the small lot of land in question. But, in my opinion, that would be reviving the doctrine which the new Statute of Limitations was intended to put an end to, and would make the operation of the statute depend necessarily in all cases on their being for twenty years an adverse holding. I do not consider that understanding of the 17th section of 4 Wm. IV., ch. 1, to be correct. The mere fact of the holder of a good paper title not having been in actual possession by himself or tenant for twenty years, has never been held by us to bar his title; because, while he holds a good title uncontested by any one—and there is no other ground for imagining that he has abandoned his interest than the mere fact of his not having resided on and improved his land—this cannot be reckoned a discontinuing of possession within the meaning of the statute.

But then, we find Taylor first selling the rear fifty acres of a lot, which there is no doubt he and all others at that time supposed to contain 200 acres, and to be 100 chains in depth, according to which supposition the rear 50 acres would be the rear quarter; and soon after this he sells the front three-quarters, and then leaves the lot altogether, no doubt considering that he had sold the whole. Now, after nearly forty years, upon a discovery made several years ago that there was a surplus in the lot, and that the descriptions did not meet, he brings this action for the purpose of gaining possession of that small surplus. In such a case, it appears to us, it should be left to the jury to say whether Taylor, having been in possession of the rents and profits, had not discontinued such possession, and whether such discontinuance of possession was not more than twenty years before action brought.

We consider that while Taylor was living on the lot, not having sold to any one, he was in actual occupation of the whole, because his title covered the whole, and it was of no consequence whether he left part in wood or not; then if the jury should find, that intending to sell all, and supposing he had sold all, he withdrew from the possession,

the Statute of Limitations must have begun to run against him from the time of his removal ; or I do not know in what case and under what circumstances we can give any force or effect to the words, "when the person claiming such land shall in respect of the estate or interest claimed have been in possession, or in the receipt of the profits of such land, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right to bring an action shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession."

It seems true here that neither Tisdale nor Kemp, nor their vendees, have in the interval taken possession of the small piece of land in contest, but that does not affect the question and no one has possessed it for twenty years ; but dispossession and discontinuance of possession are not both required by the statute ; the expressions are used disjunctively, and there is no doubt that it may happen in cases under the statute that one may by discontinuance have lost his right, when at the same time no other person can be said to have acquired a right to the property by possession against him. That may lead to consequences perhaps not foreseen or intended by the legislature ; but it is a consequence noticed by English commentators on the statute—not, however as a circumstance which can prevent the operation of the statute as a bar in a clear case of discontinuance of possession. It would lead to great inconvenience, if a person who has sold a lot of land in parcels could come after twenty years and claim the benefit of a few inches, or a few feet of surplus unknown to any one, and intrude himself between adjacent properties.

I think there should be a new trial without costs.

DRAPER, J.—It appears to me the verdict for the plaintiff should be set aside. The case was apparently left to the jury as if in order to defeat the claim of the plaintiff's lessor ; it was necessary to shew there had been a possession adverse to him for twenty years next before action brought—*i. e.*, an entry into possession of these $2\frac{6}{10}$ acres—by some person who claimed to hold them as owner ;

though such entry might have been only by entering into the front three-quarters, claiming to take and hold all the land from the front to the rear fifty acres.

I do not so construe the 4 Wm. IV., ch. 1, sec. 17. I take it the words "have been dispossessed," and "have discontinued," are intended, and are used to represent two distinct things. The doctrine of non-adverse possession is put an end to by the statute.—*Napean v. Doe d. Night (a)*. The question is whether twenty years have elapsed since the right accrued, whatever be the nature of the defendant's possession. This question depends, under the statute, upon when the lessor of the plaintiff was dispossessed or discontinued. I take the former term to refer to the act of a third party, the latter to an act of an owner himself; and that, in order to establish a discontinuance of possession, it is not *indispensable* to shew a possession by a third party; and therefore that the jury should have been asked to decide, as a matter of fact, on the evidence of the sales to Tisdale and to Kemp, and of the lessor of the plaintiff having quitted the premises in 1814—being at that time in possession—and never having re-entered; whether the plaintiff did not in 1814 discontinue the possession, without reference to the additional enquiry whether Kemp then entered into possession of the $2\frac{6}{10}$ acres in question; and if they found such discontinuance, to give a verdict for the defendant.

We were referred to a case of *Doe Cuthbertson v. McGillis*, recently decided in the Common Pleas, in which this question of discontinuance was discussed. The decision in that case has not yet been reported, and I have not been able to consider it (*b*).

As at present advised, I think there should be a new trial without costs.

Per Cur.—Rule absolute for new trial without costs.

(a) 2 M. & W. 893.

(b) Now reported in 2 C. P. 124.

THE MARMORA FOUNDRY COMPANY V. JACKSON.

THE SAME V. McELROY.

Action against a shareholder for calls.

By the Marmora Foundry Act, 1 Wm. IV. ch. 11, it is provided that the stock subscribed for "shall be due and payable to the said company" in the manner mentioned in the act; and that in case of neglect or refusal to pay the instalments due on shares, such shares shall be forfeited and sold.

Held, (in accordance with the Court of Common Pleas,) that the company were not restricted to the remedy by forfeiture;—and also, that they might maintain an action against a shareholder upon calls of stock subscribed. (Draper, J., *dissentiente*.)

This was an action of the Marmora Foundry Company against the defendant, for calls made on the stock subscribed for by him.

The plaintiffs sought to recover the first instalment, and also two calls of ten per cent. each, made by the directors under the act of incorporation.

The second and third counts of the declaration were demurred to: and the ground taken was, that the plaintiffs could maintain no action at common law against one of the shareholders in the company, upon calls of stock subscribed, and that no such remedy is given by the act which forms their charter, 1 Wm. IV. ch. 11.

McMichael, for the demurrer.

Cameron, Q. C., *contra*.

The statutes and authorities referred to fully appear in the judgment of the court.

ROBINSON, C. J.—The question whether this company can sue a shareholder for calls has been before the Court of Common Pleas of Upper Canada in no less than three cases, where actions were brought by this same company against shareholders for calls; the declaration, however, in each of those cases being in debt, and not in assumpsit, as it is in the present case. I refer to the cases of the Marmora Company against Ponton, against Boswell (*a*), and against Murney (*b*), in all of which it was held that the company could sue in debt for calls; and in support of their opinion that court referred to the cases of Venning v. Leckie, 13 East. 7; Bedford et al. v. Brutton et al., 1 Bing. N. S. 399; and Andrews v. Ellison et al., 6 Moore, 199.

(*a*) 1 C. P. 1.

(*b*) 1 C. P. 175.

It did not appear to them that there was much force in the argument founded on a comparison of the statute 4 Wm. IV. ch. 28, secs. 17 and 18, creating the Cobourg Railway Company, with 9 Vic. ch. 80, and 10 & 11 Vic. ch. 87, secs. 7, 8, and 9, which last mentioned statute had been relied upon in argument as amounting to a declaration that without a special provision there can be no such action as this for calls. They observed that in the first of the Cobourg Railway Acts referred to, the provision is merely that the stock shall be "*payable by instalments*" at such times as it shall be called in; while in the act incorporating the Marmora Foundry Company it is expressly said (4 Wm. IV. ch. 11, sec. 4), that the amount of stock subscribed by each shareholder "*shall be due and payable to the company.*"

The Court of Common Pleas formed, on this express provision, the opinion that the company must be held entitled to sue for that which is by the act made payable to them.

In the Cobourg railway acts, the provision not being so express, that the stock shall be *payable to the company*, they did not regard the two acts as placing the question on the same footing. In regard to the Cobourg Railway Company the legislature seems to have assumed that they were not in a condition to bring actions for calls. The preamble to 10 & 11 Vic. ch. 87, it must be confessed, appears to intimate that opinion pretty clearly, though the seventh and following clauses might at any rate have seemed necessary, in order to make the form of action more concise and convenient, even although the legislature had not been under the impression that actions at law would not lie for calls.

If there were nothing to stand upon but the difference in the language of the Cobourg Railway Acts and the Marmora Foundry Act in this respect, I should hesitate to look upon that as sufficient evidence to rest upon; for although the Cobourg Railway Act speaks of the instalments as "*payable*" only, without expressing to whom payable, yet we can hardly imagine anything else to be meant than "*payable to the company.*" That seems to be clearly implied; and if an action would lie in this case, the legislature

need not have doubted, I think, that an action would equally have lain in the other, although it would still have been desirable to make the special provision, which the statute 10 & 11 Vic. ch. 87 does make for facilitating such actions. However, we have here a statute providing in express terms that the stock subscribed shall be payable to the company," and another clause giving the company power expressly to sue in all manner of actions, and for all matters and causes; and then the question is why may they not sue upon this call as a cause of action?

If they can sue this defendant at all, notwithstanding his being a member of the company, then for the reasons given in the case of the Consumers' Gas Company v. Nicolls, in this court (7 U. C. R. 91), I consider that they are not restricted to an action of debt, but may bring assumpsit as well.

Then, upon the main question, whether an action will lie at all, I think it is not an objection that the statute provides as it does, for forfeiture of shares in case of non-payment, for it does not give an option merely to do that or bring an action, as the 49th section of the English act 6 and 7 Wm. IV. ch. 121, does, on which the case of the Edinburgh Railway Company v. Hebblewhite was decided, 6 M. & W. 707. When the remedy is not in terms, restricted, it is reasonable to hold the remedy by forfeiture and sale of shares to be cumulative, rather than that it necessarily supersedes any remedy that there would otherwise have been by action. It would seem to have been the opinion of the court in the Huddersfield Canal Company v. Buckley, 7 T. R. 36, that an action would only lie for calls made while the subscriber still held his shares; but there is no difficulty on that point in this case. If there was anything in the nature of the provisions themselves respecting the forfeiture of shares, or in other parts of the act, to shew that the legislature intended that the only remedy should be by insisting on the forfeiture, then we ought to give effect to such intention; but I find nothing having that tendency: and looking merely at the reason of the thing, if an action would lie in general for calls, I should

say it ought not the less to lie because provision is made for selling the shares of defaulters. That might often be an inadequate remedy. A board of directors, confiding in a subscription list, might warrantably enter into contracts incurring a large responsibility and it might be afterwards discovered that by reason of unexpected difficulties, or the unlooked for competition of some rival company, the speculation was most unlikely to be profitable. If all the stockholders who might despair of the undertaking were at liberty to say, "I will pay up no more—you may sell my stock," and if those shares would bring little or nothing in the market. The directors would be left without the means of meeting their engagements. In my opinion, if the defendant is liable to be sued by the company for calls, he may be sued in this form of action as well as in debt, and is not the less liable because his shares may be forfeited. It is true, the fifth clause of the act says that in case of default the stockholder *shall* forfeit his shares, and that the shares so forfeited *shall* be sold; but these words do not, more than in other similar cases, impose a necessity for insisting on the forfeiture, and the use of a double remedy can always be restrained so that it shall not be used for obtaining a double satisfaction, to the oppression of the party.

It is reduced therefore to the single question, I think, whether in a case like this, and on such a statute, there is any legal impediment to a corporation suing a shareholder for calls upon his stock. In the case I have already referred to, of the Edinburgh Railway Company v. Hebblewhite, it was assumed in argument by counsel, that in such a case there could be no action unless the statute expressly gave it, because the parties are partners. "It is an action," he says, "entirely given by statute." He does not mean only that an action in that short form would not lie without the aid of the statute, but that no action of debt would lie; and certainly if debt would not, no other form of action would. None of the judges however assent to or notice the remark, and it was perhaps made without much consideration. What is said by Lord Denman and Mr. Justice Patterson, in

the case of the Dundalk Western Railway Company v. Tapster, 1 Q. B. R. 668, is more embarrassing; for there, in an action brought for calls against a proprietor of shares in an incorporated company, it was objected that the statute which expressly gave the remedy by action for the calls, limited the action to any of the Queen's Courts of Record in Dublin. The plaintiffs' counsel contended that the action might nevertheless be brought in the Queen's Bench in England, for that the jurisdiction of the supreme courts of Westminster Hall was not to be ousted without express words. Patterson, J., said to the counsel, "It is only by the aid of the statute that one partner can sue another. Must you not take the remedy the statute provides?" The learned counsel answered that the partnership was incorporated; to which the learned judge replied by asking, "could such a corporation sue its own members without the express provisions of the act?" The counsel observed, "There is no objection to it on principle;" and then the conversation on that point dropped, and the argument went on, but upon another objection. The opposite counsel maintained that the act created a debt and a remedy for that debt, which the plaintiffs were bound to pursue. The Court seemed satisfied on the point and stopped him, Lord C. J. Denman remarking that "the right and remedy are both created by the legislature, and the company are bound to pursue the remedy provided by it:" so the case was at once determined. The report does not shew whether the defendant was a shareholder by subscription, or by assignment from a subscriber. He was declared against as a proprietor of shares. If he merely became a proprietor by purchasing shares from a subscriber, then I should not feel that this case created any difficulty; but if he were a subscriber and in that sense an original promiser to the company, then what is said in that case would certainly seem to militate strongly against the decision in our Court of Common Pleas, in the cases to which I have referred. But I cannot think that either of the judges in England, in the case I have cited, meant to lay it down as an unqualified and self-evident proposition, that an aggregate corporation of this description cannot sue

one of its own members without the express authority of a statute ; for with respect to banks and insurance companies, and other trading corporations, such actions are of daily occurrence. The books contain numbers of such cases, and there is no technical rule which prevents it in all cases. The case of *Venning v. Leckie*, 13 East, 7, cited in the judgment of our Court of Common Pleas, is not perhaps strictly applicable in the present case, though it meets the objection of Mr Justice Patterson, that one partner cannot sue another. In this case the objection is rather that as a person cannot sue himself, so this corporation, of which the defendant is a member, cannot sue the defendant. But that can by no means be stated to be a universal rule, for we see daily exceptions to it in practice. We see actions brought both by corporations against individual members, and by individual members against the corporation. In *Tilson v. The Warwick Gas Light Company*, 4 B. & C. 962, Bayley, J., says, "Where an act of Parliament casts upon a party an obligation to pay a specific sum of money to particular persons, the law then enables those persons to maintain an action of debt," and there is clear authority to shew that *assumpsit* will as well lie. This statute provides that the stock subscribed shall be payable at such times as the directors shall appoint; and it says expressly that it shall be "payable to the company." There can be nothing in the way but the supposed technical difficulty of a corporation in any case suing one of its own members—a difficulty which we see is not allowed in fact to prevail when the transaction is one entered into by the member on his own individual account. When a bank sues one of its members on a note which it has discounted, the money goes into the partnership fund, in the profits arising out of which fund the member sued will participate; yet that does not prevent such actions being maintained. In this case the company was incorporated by the statute on its passing, and it had a corporate stock to dispose of. This defendant excepted so many shares of that stock and for them engaged to pay the company by the very act of subscribing, the price fixed by law. There is then a promise made by an individual to

the company on his own account, as much as in the case of a promissory note made to a bank; and I see no reason or principle against sustaining an action on the promise.

Mr. Angel, in his treatise on Corporations, goes much more into this subject than any English treatises. In his 15th chapter he treats it as clear that such an action as this is maintainable, for he begins by saying, that "A subscription for stock in a joint stock incorporated company is a contract, and the interest thereby acquired is a good consideration to support an action for the amount subscribed against the subscriber." He refers to Wordsworth on Joint Stock Companies, p. 317, and to 39 English Law Library, p. 85; but I find nothing there to support what he says. Indeed, in England, as soon as corporations of this kind came into use, they seem to have provided expressly for bringing actions for calls, and for framing the declaration in a very compendious form; and the cases that have arisen are upon points of pleading or evidence in actions brought upon such statutes. I have found no case of an action brought under other circumstances in England, nor any discussions in English books upon the subject. There is no adjudication of a court that I can see clearly to be against it in a case like the present, nor any assertion to that effect in any book of authority, except in the case reported in 1 Q. B. R. 668, which may, however, have been a case in which the party sued was not a subscriber, and so not a contractor with the company, which would account for the *dictum*, and would render the authority inapplicable here. I am surprised that we find so little on the point in our books, and regret it, for it would have been satisfactory to have found a decision or precedent expressly in point. Reason, I think, is strongly in favour of it, and the decision of the Court of Common Pleas upon the same point, and in respect of the same statute, is entitled to much weight. We ought not to overrule it unless we could see that it is certainly wrong. My inclination is altogether in favor of it, for here was on one side the corporation legally constituted, and capable of receiving the promise; on the other

side a promise made to that corporation in the manner sanctioned by law, and a good consideration for that promise; and the very nature of the thing, for the security of those dealing with the corporation, and for effecting the object of incorporation, must inevitably require that the persons subscribing should pay the money which is to compose the capital, without reference to the question how the account might stand as between the corporation and the individual member at any stage of the business; so that the reason against partners suing each other does not apply in this case: and, as to the mere technical objection that a man cannot be plaintiff and defendant on the same record, that no more applies here than in numerous instances in which it is not allowed to be any impediment. I think the plaintiffs should have judgment on demurrer in this case and the other against McElroy (*a*).

DRAPER, J.—I have not been able to bring myself to concur in opinion with the rest of the court. As, however, the opinion of my learned brothers is in accordance with the unanimous judgment of the Common Pleas, I freely admit there is every reason to conclude they are right, and I must the more regret my inability to concur. Indeed, I should have been willing to let the judgment pass *sub silentio*, and have nominally acquiesced, as I shall effectually be bound by its authority, if I had not felt so strong a leaning to the opposite view. On this account I think it right to point out the difficulties which I have felt insurmountable in the way of arriving at the same result with them.

I can find no English case which determines that such an action as this is maintainable. If the reports were wholly silent on the subject, it might be inferred that the right was undisputed and undeniable, and that at common law an action for calls might be maintained by a corporation against a shareholder, without aid from the act of incorporation or deed of settlement; and in Angell & Ames on Corporations, 3rd ed. 474, it is said, "a subscription for

(*a*) See *Holmes v. Higgins*, 1 B. & C. 74; *Neal v. Turton et al.*, 4 Bing. 149; *Davies v. Hawkins*, 3 M. & S. 488.

stock in a joint stock incorporated company is a contract, and the interest thereby acquired is a good consideration to support an action for the amount subscribed against the subscriber ;” and Wordsworth on Joint Stock Companies, 317, is referred to, apparently in support of the position. I have referred to Wordsworth (5th ed.), but neither there nor anywhere else do I find a passage, which can, I think, be considered as warranting the quotation. In page 387, 5th ed., Mr. Wordsworth says, that in order to facilitate the formation of such companies “it is considered desirable that such capital should be subscribed in small sums. These are instalments, or calls, required to be paid from time to time. The payment of them is enforced, either under the act of parliament or deed of settlement by which the particular company has been established. *As the authority thus given is important both in its character and effects, it must be strictly pursued.*” thus putting the right to sue, as it seems to me, upon a contract entered into by the shareholders, ratified by act of parliament, with a specific remedy given to enforce it ; or upon an express contract contained in the deed of settlement ; and every decided case on the subject in England will, I think, be found to range under one of these two heads. Possibly the passage in Angell & Ames has reference only to such actions, and does not, (as I believe has been supposed) indicate an opinion of the learned writers, that an incorporated company can maintain an action for calls against a subscriber for shares on the capital stock, exclusively on the right arising from the relation thereby created, and based on the consideration of the interest acquired without any power to bring such action being given by the charter or act of incorporation, beyond the usual power incident to all corporations to sue and be sued. At page 393, Mr. Wordsworth, after referring to the liability in companies formed under the act 7 & 8 Vic. ch. 110, and banking companies formed under 7 & 8 Vic. ch. 113, as provided for in these acts, adds, “This liability in other companies depends upon the particular provisions of the act of parliament if incorporated ; or, if not, then upon the particular

deed of settlement ;” and again, at page 401, “actions for calls must be brought upon the statute, where a company are incorporated or upon the deed of settlement, where that is the only instrument of regulation.” In the *Dundalk Western Railway Company v. Tapster*, 1 Q. B. 667 ; 5 Jur. 699 S. C. Patterson, J., says, “The difficulty in this case is, that *the company could not have sued a proprietor at all at common law*, and therefore it must pursue the very remedy given by the act of parliament.” And Lord Denman says, “the whole is the creation of the act of parliament, *both the right to sue and the particular form of the remedy* ; and therefore the remedy prescribed by the act must be pursued. *The 74th section, indeed, gives the right to sue in all the courts for the purpose of recovering calls from subscribers.* In that case the defendant had been sued as a *proprietor*, under the 75th section of the act, by which special authority was given to sue any *proprietor* in the supreme courts in Dublin ; while under the 74th section *subscribers* might be sued in any of the superior courts—not limiting the suit to the Irish courts. I am unable to deduce from the foregoing language, taken from the report in the Jurist, any other conclusion than this :—that if the action against subscribers had been limited by the 74th section to the Irish courts, as it was by the 75th section, against proprietors, the same result would have followed—viz., that the action could only be brought in these courts, and not in the Queen’s Bench, in England. According to the report in 1 Q. B., Patterson, J., says, “It is only by aid of the statute that one partner can sue another ;” and he inquires, could such a corporation sue its own members without the express provision of the act ?” The distinction suggested between a subscriber and a proprietor, meaning by the latter term one who has acquired shares by purchase and not by original subscription, cannot, I think, affect the application of what is said by Patterson, J., or weaken the conclusion which I deduce as well therefrom as from Lord Denman’s judgment : that the mere relation of incorporated company and shareholder in such company, does not enable the former to maintain an action against the latter for calls ; but that the

power to bring such an action must be given by the act of parliament, or, in unincorporated companies, by their deed of settlement.

We must therefore look to the statute incorporating the plaintiffs, for this power. It recites a petition of three persons, representing that one of them is the proprietor of the Marmora Iron Works, and it incorporates those three persons, and "such persons as shall hereafter become stockholders" in the said company with the usual corporate powers. It directs books of subscriptions to be opened within two months after the passing of the act, authorising any person to subscribe for "any number of shares, *the amount whereof shall be due and payable to the said company in the manner hereinafter mentioned*, that is to say: ten per cent. on each share so subscribed shall be payable to the said company immediately after the stockholders shall have elected the number of directors hereinafter mentioned; and the remainder by instalments of not more than ten per cent., at such periods as the president and directors shall from time to time direct and appoint for the payment thereof." And, by a subsequent section, if any stockholder neglect or refuse to *pay to the company* any instalment due on any shares, at the time required by law, such stockholder *shall forfeit his shares, together with the amount previously paid thereon*; and the forfeited shares *shall be sold*, and the proceeds, with the amount previously paid, shall be applied in like manner with any other funds of the company; provided that the purchaser of such forfeited shares shall pay the company "*the amount of the instalments required, over and above the purchase money*" of the shares purchased, immediately after the sale, and before a certificate of transfer shall be given; by which I understand, that the purchaser of the forfeited share is bound to pay the instalments for the non-payment whereof the share was forfeited. The right to bring actions generally rests on these words: that the company "shall be capable of contracting and being contracted with, of suing and being sued, pleading and being impleaded, answering and being answered unto, in

all courts and places whatsoever, in all manner of actions, suits, [complaints, matters, and causes." I cannot say I have any doubt that, taken alone, this provision will not enable the company to sue its subscribers for calls. It is no more than the power which is incident to all corporations duly created, and if *per se* it gave the power in question, it is impossible that some trace of its exercise should not be found in the English books. I have not met with a single instance of such an action without an *express power* given to the corporation to bring it; nor one in which the power to sue for calls has been implied, whatever language the legislature may have used in authorising calls for the capital stock to be made.

It has been argued, however, that the words "*due and payable to the company*," create a debt, and impose an obligation on the subscriber to pay; and that, in the language of Bayley, J., in *Tilson v. the Warwick Gas Light Company*, "where an act of parliament casts upon a party an obligation to pay a specific sum to particular persons, the law then enables those persons to maintain an action of debt." Acceding fully to that proposition, I do not think it decides the question. For that purpose it would be necessary to go on and say, "and the law confers the capacity, or removes any disability which the party to whom this right of action arises requires, or labours under, to bring any action." As I understand the proposition, it relates only to the right of action for the particular demand, but leaves the capacity of the party to sue where it was. As, for instance, if such a right accrued to a married woman, it would not enable her to sue without her husband joining.

It is therefore, in my humble judgment, necessary to go further, and to enquire whether, by the use of these words, the legislature has manifested an intention not only to declare the sums which are to be paid the moneys of the company, but also to confer a power of suing their own shareholders; and for this purpose I think we are warranted in examining what construction, if any, can be deduced

from the use of the same words in other acts of incorporation of banking, trading, or manufacturing companies, or those incorporated for constructing harbours, railroads, &c.

The great majority of such acts of incorporation in Upper Canada differ more or less from the statute now under consideration. The *general* corporate powers are the same, but the amount of shares subscribed is not declared to be due and payable *to the company*. Thus in the 2 Wm. IV. ch. 11, the Commercial Bank Act, it is said, "the shares respectively subscribed shall be payable in gold or silver, that is to say, 10 per cent. to be ready as a deposit at the time of subscribing, to be called for by the directors when they shall deem expedient: and the remainder shall be paid in such instalments as a majority of the stockholders, at a meeting to be expressly convened for that purpose, shall agree upon;" and then follows a forfeiture of the shares as a consequence of "neglect or refusal to pay," and a power to the directors to sell the forfeited shares; a time appointed for the first election of directors; and a provision for the commencement of business "as soon as a deposit amounting to 10,000*l.* subscribed as aforesaid, shall be paid to the said directors."

Similar in substance, except as to the amount being payable in gold or silver, and in some instances as to 10 per cent. being ready as a deposit, are the following:—2 Wm. IV. chaps. 14 and 15; 3 Wm. IV. chaps. 19, 21, and 22; 3 Wm. IV. ch. 20, and 5 Wm. IV. ch. 15, in which the forfeiture for non-payment is to take place "if the directors shall so order and direct;" 4 Wm. IV. chaps. 28 and 32; 5 Wm. IV. chaps. 14, 16, 17, and 19; 6 Wm. IV. chaps. 5, 6, 7, 10, 11, and 12; 7 Wm. IV. chaps. 47, 48, 49, 52, and 55; 1 Vic. chaps. 29, 30, 31, 32, and 33; 3 Vic. ch. 33.

The larger number of these acts provide that the instalments due may be received in redemption of forfeited shares at any time before the day appointed for the sale thereof.

The following acts make the amount of the shares *due and payable* (not saying, to the company) as follows,—“ten per

cent. one each share so subscribed shall be *payable to the said company* immediately after the first election of directors, the residue by instalments as may be directed by the president and directors, 5 Wm. IV. ch. 18; 7 Wm. IV. chaps. 46, 51, and 54; 3 Vic. ch. 34; and none of these enable a shareholder to redeem a forfeited share by payment of the instalment.

The 6th Wm. IV. ch. 9 (the Toronto Gas Company) requires a sum to be paid down at the time of subscribing, to the person in charge of the books, to the use of the company; declaring a forfeiture on non-payment of subsequent instalments, and giving no permission to redeem shares that have become forfeited.

Most of these acts require subscription-books to be opened in different parts of the province, and limited the number of shares which might be subscribed for in the first instance, apparently assuming that the stock would be sought after: that the privilege of obtaining shares would be considered of some value; and, therefore, that the first instalment would be readily paid.

Only two of these acts call for further particular remark. One, which was pressed in argument in the Court of Common Pleas in connection with two acts passed since the union—viz, the 4th Wm. IV. ch. 28—the Cobourg Railroad Company Act. This was altered by the 9th Vic. ch. 80, which changed the name and object of the company into the Cobourg and Rice Lake Plank Road and Ferry Company. The directors were authorized, immediately after their appointment, to call upon the stock-holders for an instalment of ten per cent. on each share, and the residue of the shares was declared “to be payable by instalments” as the stockholders might determine; and on non-payment the shares were declared by the act forfeited, and the directors were to sell them—the purchaser paying the instalments due, over and above the purchase money of the shares. This act was amended by the 10th and 11th Vic. ch. 87, the fifth section of which enacted that the subscribers “shall pay the sums respectively so subscribed, or such portions thereof as shall be, or shall have been from

time to time called for by the directors ;” and the seventh section expressly empowers the company to sue the stockholders for calls.—See also 13 & 14 Vic. ch. 134, sections 5, 6, and 7.

The other act, 3 Wm. IV. ch. 18, (the British American Assurance Company), required ten per cent. to be ready for deposit at the time of subscribing, to be called for when the directors saw fit, and the remainder to be *payable* in such instalments as a majority of the shareholders might determine. The legislature did not think this conferred a power on the company to sue for calls, and by 6 Wm. IV. ch. 20, sec. 11, referring to the power of forfeiture contained in the former act, they enacted that in case the board of directors should think it more expedient to enforce the payment of instalments than to forfeit the shares, the company might sue for and recover such instalments. But, because (as appears to me) they were imposing a new condition on the then shareholders, the 15th section expressly authorizes those shareholders who desire it to withdraw from the company, and oblige the company to refund to them whatever moneys they may have paid on their shares. I cannot draw any satisfactory distinction between the words “due and payable to the company,” used in the act incorporating the plaintiffs, and the language of 3 Wm. IV. ch. 18, by the terms of which the deposit is to be ready at the time of subscribing, “to be called for by the directors as soon as they may deem expedient,” and the remainder is to be “*payable*” in instalments; and in case any stockholder neglects “*to pay to the said directors*” such instalment, his shares may be forfeited. I think the whole clause makes the instalments payable to the directors, which is equivalent to making them payable to the company. In my judgment, the one imposes an obligation on the shareholders to pay the instalments as much as the other; and the act 6 Wm. IV. ch. 20, shews that it did not, in the judgment of the legislature, confer on the British America Assurance Company a power to sue their shareholders for calls.

There is a still greater variety of provisions in acts passed for similar purposes since the union.

In some, either a named percentage is to be paid at the

time of subscribing, or the first instalment is to be called in immediately after the directors are elected; the residue to be payable by instalments as the shareholders, at a general meeting, may direct. On neglect or refusal to pay, the shares are forfeited, and may be sold for the benefit of the corporation by the directors. In most, though not in all, the directors may receive the instalments due by the defaulter before the day appointed for the sale, in redemption of the shares. The following are of this description: 4 & 5 Vic. chaps. 56, 60, and 80; 8 Vic. chaps. 88 and 95; 9 Vic. chaps. 80, 83, 84, 88, 98, 107, 108, 109, and 110.

In others, for banking companies, a named percentage is to be paid at the time of subscription, the residue by instalments as the directors may appoint. On non-payment the shareholders are to incur a forfeiture equal to 10 per cent, on the amount of their stock; and the directors may sell sufficient shares to raise the unpaid instalment, and the amount so forfeited. The directors, or the stockholders at a general meeting, may remit the forfeiture. The shareholders are liable for double the amount of their stock; but the act contains no provision to enforce this liability. Such are 4 & 5 Vic. chaps. 97 and 98; 6 Vic. chaps. 26 and 27; 9 Vic. ch. 117.

The 4 & 5 Vic. ch. 96, (the Niagara District Bank) differs. The shares are declared by the act to be forfeited by neglect or refusal of the holders to pay instalments, and may be sold by the directors. But before sale the directors may, notwithstanding such forfeiture, allow the defaulter to pay up all instalments due, and to retain his shares. The double liability of the shareholders is also declared; and the amount thereof beyond the first value of the stock may be called in by instalments, and on neglect or refusal to pay the corporation may bring actions.

In others, such as 10 & 11 Vic. ch. 68, (the Montreal Mining Company), the directors are empowered to make calls, and to sue for and recover such calls, and to declare shares to be forfeited in case of non-payment, on such terms and in such way as they shall see fit by any by-law.

In others the shareholders "*are required*" to pay the

amount of these shares in such a manner as shall be ordered by the directors, and in case any person shall neglect or refuse to pay, the company may sue for and recover the same, with lawful interest. If the neglect or refusal continue for six months, the shareholder shall "absolutely forfeit" his shares, which shall be sold for the benefit of the company. But no advantage of such forfeiture shall be taken until the shares be declared forfeited at some general meeting of the stockholders; and every such forfeiture is to operate as a discharge of all actions and liability in respect of the shares. Such are 7 Vic. ch. 45; 7 Vic. ch. 63; 7 Vic. ch. 64. One of these acts says, "Every shareholder shall be liable to pay the amount of calls" to the persons, and at the times and places, appointed by the company.

The 4 & 6 Vic. ch. 79, enacts, that the amount of the shares "shall be due and payable as follows,"—and then points out how—forfeiting the shares on neglect or refusal to pay.

The 4 & 5 Vic. ch. 57, after the general words of incorporation, authorizes the shareholders at a general meeting, among other things, to vest in the directors such powers as they may think right, to manage the corporation and its business.

In some acts, again, the calls are to be made by the directors, and if any person neglect to pay at the time and place appointed, he shall forfeit a sum not exceeding five per cent. on his stock. If such neglect continue two months, he shall forfeit his shares, for the benefit of the other shareholders. No advantage is to be taken of the forfeiture, unless the shares be declared forfeited at a general meeting. Forfeiture is to be an indemnity against all suits commenced for calls against the defaulter. The subscribers are "required" to pay calls, and the company may sue for them. Such are 8 Vic. ch. 25; 9 Vic. ch. 82; 10 & 11 Vic. ch. 64.

In others the calls are to be made by the corporation, and if not paid at the day the shareholder becomes liable for interest, and may be sued for the calls and interest; and, on failure of payment with interest for three months from the day appointed for payment, the directors may declare the

shares forfeited, and may sell shares enough to raise the sums due, returning the surplus, if any, to the defaulter. Such are 8 Vic. chs. 91 and 92; 9 Vic. ch. 94.

In some of the later acts it is provided, that subscriptions for shares, whether made before or after the passing of the act of incorporation, shall be binding on the subscribers, who shall, and they are hereby required to pay the sum by them subscribed," to the persons, and at the times and places required by the directors; and a power to sue in case of neglect or refusal is expressly given, as well as forfeiture, if the payment be delayed beyond a limited time. See 11 Vic. ch. 13; 12 Vic. chs. 157 and 158; 13 & 14 Vic. chs. 113, 115, 115, 117, and 132.

I have examined these and other similar acts of our own legislature, for the purpose of discovering how far they exhibit a construction of the various powers given, and words or phrases used; and as a guide, as far as they afford one, to construing the act under consideration. I think the following conclusions deducible from that examination:—

1st. That by the erection of a corporation capable of contracting and being contracted with, suing and being sued, pleading and being impleaded, answering and being answered unto, in all courts, &c. in all manner of actions &c., the legislature have not enabled such corporation to maintain suits for calls, either for the first or any subsequent instalment of the capital stock, against any subscriber or proprietor.

2nd. That an express enactment that a percentage as a deposit *shall be ready* at the time of subscribing, but *to be called for* by the directors when they deem expedient, and that the "remainder shall be payable" by such instalments as the stockholders shall determine on, will not *per se* confer on the corporation a power to bring suits for such instalments.

4rd. That powers given to the directors to make by-laws, generally for the management and disposition of the stock, effects, estate, and business of the corporation, will not extend to enable them to bring such suits, or to pass a by-law authorizing and giving effect to such suits.

4th. That where the statute expressly declares that

forfeiture of the share shall be the penalty of neglect or refusal to pay a call, and that the forfeited share shall be sold, and the proceeds, together with the amount previously paid thereon, shall be accounted for and applied in like manner as any other funds of the corporation—and the statute requires no act or declaration of the directors or company to *complete* such forfeiture, and gives no power to *remit* it, and gives no other *express* power, which can only be exercised on the assumption that the defaulter is still to be considered a shareholder : such forfeiture must be taken to be absolute on the neglect or default taking place, and to extinguish the right to the shares, and all further liability in respect thereof to the company (a).

Applying these conclusion to the statute incorporating the plaintiffs, and endeavouring to construe it in reference to them, and to the observations more particularly suggested by a consideration of the acts incorporating the British America Assurance Co., it further appears to me :

1st. That admitting the words “due and payable to the said company” to be sufficient to create a debt, the statute gives forfeiture, and that only, as the remedy ; and that the company cannot assume a right to sue because the remedy by forfeiture may be inefficient.

2ndly. The forfeiture being *absolute* by the express language of the act, it would be inconsistent therewith that an action should be maintainable, which is necessarily predicated on the assumption that the party sued still continues to be a shareholder.

3rdly. That it is not necessary to hold that an action for calls is maintainable in order to give any effect to the words, “that the amount of the shares shall be due and payable to the company.” Their purpose is answered by confining them to operate as a declaration that the amount of each call, when paid, is the money of the company, to whomsoever the payment, under the terms of the call, may have been made ; so that the company would have a right of action against all those to whom any such calls had been paid, to recover the amount thereof.

(a) See 13 & 14 Vic., ch. 134, secs. 5, 6, 7.

I think judgment should be for the defendant on this demurrer.

I refer, among many others, to the following authorities, as more or less connected with the case :—*Venning v. Leckie*, 13 East. 7 ; *McMahon v. Upton*, 2 Sim. 473 ; *Hickens et al. v. Congreve et al.*, 4 Russel, 562 ; *Williams v. Beaumont*, 10 Bing. 260 ; *Lawrence v. Wynn*, 5 M. & W. 355 ; *Skinner v. Lambert*, 4 M. & Gr. 477 ; *Fyler v. Fyler*, 6 Jur. 479, 7 Jur. 185, S. C. ; *Aylesbury R. R. Co. v. Mount*, 4 M. & Gr. 651 ; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341 ; *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36 ; *Giles v. Hutt*, 3 Exch. 18 ; *Great Northern R. R. Co. v. Kennedy*, 4 Exch. 417 ; *Miles v. Bough*, 3 Q. B. 845.

BURNS, J.—After much consideration of this case, in the course of which I have not been free from doubts as to the correctness of the conclusions I have arrived at, the ultimate result is, that I think the present action is sustainable by the corporation for the amount of the calls upon the shares.

The first question which presents itself is, whether the provision contained in the 5th section of the charter, as to forfeiture operates, is to be considered as the only remedy against members in default. The shares are transferable ; but, by the 6th section no transfer can be made until the first instalment shall have been paid, and that instalment the act declares shall be payable to the company, immediately after the stockholders shall have elected the first body of directors. That payment, so far as regarded the amount and time of payment, the legislature disposed of, and placed no power in the company or its managers ; and it was to be payable upon the perfect organization of the company by election of the managers. No perfect contract could exist between the corporation and its individual members until the subscriptions of stock reached the specified amount, and until then there could be no managers ; but the election of the directors, supposing the amount to be subscribed, would perfect the contract, and there would then be a body to whom the payment could be made. If forfeiture were the only penalty, and there were no responsibility beyond that, then any subscriber, as soon as the

directors were elected, might, without paying anything or incurring any loss whatever, repudiate his shares; and thus there might be a corporation in name, with a body of directors as the managers, having legal authority to make contracts and incur responsibilities and liabilities, either in the name of the corporation or upon their own responsibility, as the case might be, without the power to obtain from its members the contribution which the members of all ordinary partnerships have against each other. If such however, be the result in consequence of any omission in the act, or if it were intended that the forfeiture of some prospective future benefit should be a sufficient penalty, and no responsibility beyond that was contemplated, then, no matter what hardships individuals might labour under by reason of contracting with a company so situated, and no matter how much difficulty and responsibility the directors might personally incur, we should be bound to give effect to the act. I rather think the legislature seem to have supposed that forfeiture would begin and be applicable after the first payment made, for the words of the 5th section seem to point to such a case. In that section the first payment of ten per cent. is not called an instalment; and it was to be paid immediately on the election of directors. In the 4th section the remainder of the stock, after payment of the first ten per cent., is spoken of as to be made by instalments. If we read the two sections together, and suppose the legislature contemplated the payment of the first ten per cent. at once, and that a corporate name was given to a body of partners believing in the integrity of each other to perform what might have been naturally expected without compulsion, then we can see there would be something more than a prospective advantage to be forfeited, for where forfeiture would apply there would be at least the first payment, and in this view the words "*with the amount previously paid thereon*" would have a tangible meaning. The restriction against the transfer of the shares till after the first payment should be made, supports the view that the legislature contemplated an immediate payment of the first ten per cent. This case is not against the transferee of shares, and

therefore we are not called upon to say whether, as against such a one, forfeiture would be the only consequence of non-payment ; but, being against the original subscriber, the question is, whether, as respects him, forfeiture was the only course to take. I am not able to see my way clear ; but, upon the best judgment I can form, I think that forfeiture was not the alternative alone, but that it was intended there should be something paid upon the stock upon which forfeiture was to operate.

If this be correct, then the next question is whether an action can be upheld on this statute, either for the first payment directed to be made, or for subsequent calls of the directors, in the absence of an express power to sue the members of the corporation for payments to be made on the stock. As before remarked, the first payment was directed to be made by the legislature, and declared to be due and payable to the company immediately on the election of directors. There is much difficulty in reconciling this provision of the charter with the view that payment of that sum depended on the spontaneous act of the subscriber subject only to the penalty of forfeiture. If the latter were intended, there seems no reason why the directors should not have been vested with the power of calling for it. I think the legislature must have intended to create a liability on those subscribers most certainly who elected the directors, and to have imposed an obligation to pay the sum mentioned in the charter to the company. Each subscriber would see, upon his undertaking in the first instance, that unless a certain amount were subscribed he did not become a holder of shares, and he would see that ten per cent. was to be due and payable upon the election of directors. These terms appear to be a mutual guarantee to each other that the company could not be formed except upon a certain amount of capital, and a certain percentage of that to be paid immediately ; and therefore might be the inducement for many to enter into it who otherwise would not. The act of parliament must, as respects the members, be looked upon as the contract between themselves, and though framed by the legislature for them, yet when signed by them is as

effectually binding as if the contract were framed by themselves. I do not look on the provision to pay the ten per cent. immediately as a direction or permission to the members to pay it, but it is a command creating an obligation, which each may well be supposed to have undertaken, to every other subscriber. In the case of an indenture of lease without a covenant to pay the rent, an implied covenant arises against the lessee from the words *yielding and paying*. If the charter be considered as the agreement of the subscribers, it appears to me difficult to draw a distinction between that and the case of the lease.

The remaining consideration is, whether the provision is sufficient to allow the company to sue, in the corporate name, one of its members for stock payments. I can see no reason why each individual member should not contract with the company, as he might do with the members of an incorporated company, that he would pay a particular individual. In the latter case an action can be maintained by the person named in the agreement; and so, on the other hand, it appears to me, if the agreement is with the corporation, an action on the agreement can be maintained by the corporation. In this case the stock is made payable to the company at a time when as a corporation it is complete. The general power to sue and be sued is given; but, independently of that, if it be true that each subscriber entered into a legal obligation to pay the company, as I should say it must follow as a consequence that the right to enforce the obligation is involved with the obligation.

If there be an obligation to pay the first ten per cent., then is there a different rule of construction applicable to the other instalments? or, in other words, does the obligation cease with the first payment, and does forfeiture alone apply to the residue of the stock? I think it would be difficult to hold that the obligation to pay was intended to be restricted, or that the true construction of the contract is that its terms are restrictive, or that they are to be confined. I think the obligation must be taken to override the whole stock, and that the payments to be called for by the directors are under the same influence as the payment declared by the legislature.

It was necessary that the forfeiture clause should be inserted, for that power very materially suffices to place the willing subscribers upon an equal footing with those who are tardy and unwilling. No forfeiture could take place without express provision, for no one can be deprived of his property by implication; but that is a very different question from implying an obligation to pay to a common object, in the prosperity of which all the subscribers must be supposed to have had an interest.

For these reasons, I have come to the conclusion that a legal obligation does impliedly arise upon the act in question: that the absence of an express power to sue members does not destroy or do away with the effect of that implied obligation; and that the words of the 4th section are sufficient authority to the company to sue its members as upon a contract to pay for stock (a).

Per Cur.—Judgment for plaintiffs on demurrer.

DOE DEM. R. & J. W. DEMPSEY v. BOULTON.

Registration of judgments to bind lands—Elegit.

The meaning of the 13th section of 9 Vic. ch. 34 is, that judgments shall bind lands from the date of their registry, not with reference only to remedy by *elegit*, but for the purpose of sale under a *fi. fa.*

Ejectment.—The following case was stated for the opinion of the court.

The lessors of the plaintiff claimed under a deed of bargain and sale bearing date the 29th of June, 1850, from William Botsford Jarvis, Esquire, as sheriff of the County of York.

The facts of the plaintiff's case, which were admitted by the defendant, were as follow :

That in a certain suit in the then District Court of the Home District, wherein one John Lyster was plaintiff, and

(1) See *Radenhurst v. Bates*, 3 Bing. 407; *Brown v. Tapscott*, 6 M. & W. 123; *Holmes v. Higgins*, 1 B. & C. 74; *Tilsen v. Warwick Gas Light Co.*, 5 B. & C. 962; *Camden v. General Cemetery Co.*, Bing. N. C. 253; *The West London Railway Co. v. Bernard*, 13 Law J. Q. B. 68; *Birkenhead, Lancashire & Cheshire Junction Railway Co. v. Brownrigg*, 19 Law J. Ex. 27; *Same Co. v. Cotesworth*, Ex. 14 Jur. 354; *Chapman v. Milvain*, 14 Jur. Ex. 251.

Reuben Parkinson defendant, a judgment was duly entered in the said court on the 18th of March, 1848; and that such judgment was docketed in the said court on the same day: that the said judgment was duly registered in the Registry office of the County of York on the 14th day of March, 1848, under provincial statute 9 Vic. ch. 34, sec. 13: that a writ of *feri facias* against the goods and chattels of said Parkinson was duly issued, and returned *nulla bona* by the sheriff of the then Home District: that a writ of *feri facias* against the lands and tenements of the said Reuben Parkinson was issued on the 28th of October, 1848, directed to the sheriff of the County of York, and placed in his hands on the same day; and that the said writ was returnable on the first day of December term, 1849: that said writ was returned, "lands on hand for want of buyers," and a writ of *venditioni exponas* thereupon duly issued, on the 13th of March, 1850, returnable on the first day of June term in that year, under which the lot of land was sold to the lessors of the plaintiff, who were the highest bidders therefor: that the sale was conducted in the manner and according to the course in which such sales are made: that a deed from the sheriff of the County of York to the said lessors of the plaintiff, for the said lot of land, was made on the 29th of June, 1850: that said lot of land was, at the time of the entry of the said judgment, and of placing the writs of *feri facias* against lands, and *venditioni exponas* and of the said sale, unoccupied.

The facts of the defendant's case, admitted by the plaintiff, were as follows:—

That Parkinson, the execution debtor, owned the land in fee, in and previous to the year 1848: that the said Parkinson was indebted to one Raymond, and that a negociation for the purchase of the land in question was pending between them for nearly a year previous: that in the harvest time, 1848, an arrangement was concluded between them, and Parkinson executed a deed in fee to said Raymond, which was not registered: that Raymond had no direct notice or knowledge of any judgment against Parkinson: that in the month of March, 1849, Raymond sold to the

defendant, Charles Boulton, the said land for a valuable consideration, the full value thereof : that neither Raymond nor the defendant had then any knowledge of the judgment against Parkinson, or of the *fieri facias* against lands : that in order to save fees of registrations it was agreed between Raymond and the defendant that the defendant should take a deed direct from Parkinson, in which case one registration would suffice : that the consideration agreed on between the defendant and Raymond was given by the defendant to Raymond ; and that thereupon, at Raymond's request, Parkinson and wife (barring her dower) executed and delivered to the defendant a common deed of bargain and sale in fee for the consideration expressed, of 50*l*.

This deed was dated the 12th of March, 1849, and was made and delivered on that day : that the last mentioned deed was duly registered on the 14th of March in the year aforesaid (1849) : that the title to the land in question was a registered title previous to the sale thereof by the sheriff : that one John Mills was patentee of the crown, and conveyed to Parkinson in the month of November, 1836, which deed was registered the 26th of January, 1849 : that the sale of lands by the sheriff was forbidden on the part of the defendant.

If the Court shall be of opinion that the plaintiffs are entitled to recover, then the verdict is to be entered for the plaintiffs ; but if the court shall be of a contrary opinion, then a verdict is to be entered for the defendant, or a nonsuit, as the court shall think fit.

Eccles, for the plaintiffs.

Connor, Q. C., contra, cited *Doe McIntosh v. McDonell*, 4 U. C. R. (O. S.) 195.

ROBINSON, C. J., delivered the judgment of the court.

The case, in our opinion, is perfectly clear in favour of the plaintiffs. The English statute referred to, 3 and 4 W. & M. ch. 20, under which dockets of judgments were required to be kept, is purely negative in its provisions. For the protection of purchasers and mortgagees, it enacted that no judgment not docketed as that act requires, shall affect the lands of the debtor. Then our Registry Act, 9

Vic. ch. 34, requires that judgments shall be registered, and provides (13th clause) that the judgment, when so registered, shall effect and bind all the lands belonging to the defendant from the time of registration "in like manner as the docketing of judgments in England affects and binds lands." The illustration, as we had occasion to notice in a former case (*a*), was an unfortunate one, because at the time of this act being passed docketing had been done away with in England, and they were referring to the supposed obligation of a ceremony which no longer took place. As we have already determined in the case alluded to, we must suppose the legislature to mean that judgments registered here shall bind the land, not by relation to the time of entry of judgment, but from the time of registration, as the judgments docketed in England (when docketing was required) used to bind from the time of docketing, and not from the entry of the judgment.

Dr. Connor has argued that the reference to English practice and authority holds us exclusively to the English mode of obtaining satisfaction from the lands of the debtor, and that the expression in our statute must be taken to mean, that as against any purchaser or mortgagee coming between the time of such registration and the placing a *fi. fa.* in the hands of the sheriff, the judgment registered here shall, from the time of registration, bind the lands only for the purpose of remedy by *elegit*, but not for the purpose of sale under a *fi. fa.* We cannot accede to this construction, but consider that the legislature meant nothing more or less than to say, that as in England judgments did not affect lands from the time of being entered, but from the time of being docketed, which first gave to third parties the means of searching for and ascertaining incumbrances, so in this country where they were requiring registry in order to give means of knowledge to third parties, the judgment should not affect the land till it had been registered.

The legislature cannot be supposed to have framed their provision with a view to process of execution by *elegit*, which they knew was never resorted to in this province,

(*a*) Doe dem. Dougall v. Fanning, 8 U. C. R. 166.

being considered to be superceded by the 5 Geo. II. ch. 7, which gives the same process of execution against lands as against goods.

Postea to the plaintiffs.

JAMES MCQUEEN & JACOB MCQUEEN V. HUGH MCQUEEN.

Account stated, evidence of—Money made payable in “yearly proportions,” meaning of—Admission of parol evidence.

“For value received I promise to pay to James McQueen and Jacob McQueen, or their order, the sum of 102*l.* 15*s.* cy., to be paid in yearly proportions.”

Held: First—That the above writing was evidence of an account stated, though the money was not to be payable immediately.

Secondly—That the effect of it was to give two years for payment.

Thirdly—That no parol evidence could be admitted of an agreement that the money should not be payable for four years, or until after the death of the plaintiff's father.

The plaintiffs sued the defendant in assumpsit. The declaration contained two special counts claiming a sum of money as due upon a sale of land, which counts were abandoned at the trial, the evidence not supporting them. There was also a count on an account stated; and the plaintiffs, in order to shew themselves entitled to a verdict on that count, produced and proved a paper signed by the defendant in these words:

“£102 15 0. “Port Dover, December, 29, 1845.

“For value received, I promise to pay to James McQueen and Jacob McQueen, or their order, the sum of an Hundred and Two Pounds Fifteen Shillings C'y, to be paid in yearly proportions, as witness my hand.”

This action was brought in August, 1849.

At the trial before McLean, J., at Simcoe, the defendant called witnesses to prove that the understanding of the parties when the note was given was, that it should not be collected till after the death of Daniel McQueen (the father of the plaintiffs and the defendant), who was still living at the time of the trial. One of the plaintiffs was called as a witness by the defendant, under the late statute, and swore that such was the understanding. It was not easy to comprehend when he meant it was to be paid, for his account of it was, “that it was to be payable by proportions a year after their father's death.” The instrument said “in yearly

proportions," which is inconsistent with the idea of its being all payable at any one time; and whether he meant that the yearly payments were to begin when their father died, and, if so, how many yearly instalments were there to be, was quite uncertain.

There were two subscribing witnesses to the note, and both were examined on the trial. One swore that the agreement among the parties, at the time of making the instrument, was, that it was not to be paid till a year after their father's death.

Two other witnesses who were present swore, that, at the time of the writing being given the defendant said he would pay the amount in two years, and that nothing was said about their father's death.

It seemed that this same writing had been sued on in the District Court, in order to recover a sum claimed to be due upon it as an instalment; and it was proved that, on the trial of that cause in 1849, the same two witnesses, who upon this trial swore that payment was to be made in two years, swore that the agreement was that it was to be paid in four years.

If evidence could be given of any parol agreement respecting the intended time of payment, and if the fact was that the note was, by agreement among the parties, not to be paid till four years had elapsed, or until after the father's death, then, in either case, this action was brought too soon.

The plaintiffs' counsel contended that none of the evidence respecting the time of payment was admissible.

The learned judge directed the jury, that if the construction of the writing was that the money was payable in two years, then the plaintiffs were entitled to recover; but if not until after four years, or not until after the father's death, then they should find for the defendant: and upon this charge the jury found for the defendant.

Galt obtained a rule *nisi* for a new trial on the law and evidence, for the admission of improper evidence, and for misdirection.

McMichael shewed case, and cited *Moffat v. Edwards et al.*, 1 Car. & Marsh. 16; *Morgan v. Jones*, 1 C & J. 162;

Clarke et ux. v. Webb, 1 Cr. M. & R. 29 ; Jardain v. Payne, 1 B. & Ad. 663 ; Wheatey v. Williams, 1 M. & W. 533 ; Greene v. Davies, 4 B. & C. 335 ; Ayrey v. Fearnside, 4 M. & W. 168 ; Middleditch v. Ellis, 2 Exch. 623.

ROBINSON, C. J., delivered the judgment of the court.

The evidence in this case shews very clearly the wisdom of the rule which does not allow the terms of a written instrument to be contradicted by parol evidence of something else being intended than was expressed ; for here we find the two subscribing witnesses differing from each other, and other persons, who state themselves to have been present, differing from both of them, and the same witnesses giving a different account of the matter at different times.

The parties and the witnesses have been engaged in family disputes, as the evidence shews ; one of the plaintiffs takes the side of the defendant in the litigation about this writing, and it is quite impossible to form even a probable conjecture, from the conflicting testimony, as to what really was agreed verbally between these parties in regard to the time of payment. It is well therefore that the law confines us, as we think in this case it does, to the contents of the writing itself ; and we are of opinion that the effect of the writing is, that the defendant admits by it that he owed the plaintiffs 10*l.* 15*s.*, which was not to be paid till after two years had expired, since it is expressed to be made payable in yearly proportions. By analogy with cases that have arisen upon leases, where the duration of the term has not been precisely defined, we think it is clear that payment could not be enforced till two years at least had expired. The uncertainty as to what period beyond that was intended to be fixed, cannot have the effect of cancelling the debt ; the only consequence is, that the debtor cannot claim any postponement of credit beyond two years, and therefore must be prepared at any time after two years to pay the debt which he has acknowledged. We think there is no difficulty in treating the writing as evidence of an account stated, though the money was not to be payable immediately ; for that is the common case of promissory notes, when received in evidence on the count for account stated, as

they frequently are: and it can make no difference that the period was uncertain, so long as we can say that according to the instrument, the money sued for is due, or rather, so long as we cannot say that the period for payment has not yet arrived. We cannot say that in this case it had not arrived when the action was brought; because we cannot say, by any rule of construction, that a credit of more than two years is given by this writing. We think there was an error in admitting evidence of any parol agreement about a four years' credit, or about not enforcing payment till after the plaintiffs' father should die. The distinction between receiving parol evidence of an agreement inconsistent with the written instrument, and of receiving such evidence for the purpose of shewing which of two meanings was intended, when the writing is susceptible of either, is well explained in the case of *Goldshede v. Swan*, 1 Exch. Rep. 154. We think that parol evidence was not admissible that a precise period of four years was agreed upon, though the instrument contains nothing that can support that construction, and still less of any stipulation about suspending payment till the father's death; and just as little admissible when the writing is used as evidence of an account stated as in any other case. It was well put in the agreement, that, if acting on any such verbal understanding, the holder of the writing had delayed to sue upon it for ten years, and the Statute of Limitations had been pleaded, the plaintiffs could not have hoped to take the case out of the statute by proving that their father was yet living, and that there was a verbal agreement that the money was not to be payable till after his death.

We think the plaintiffs are entitled to have the rule made absolute for a new trial without costs.

Rule absolute.

DWIGHT V. ELLSWORTH.

Promissory note—Illegal consideration.

An agreement not to proceed in a prosecution for permitting unlawful gambling in a tavern, is an illegal consideration for a promissory note.

Assumpsit on a promissory note.

In the first plea the defendant alleged that the only consideration for the note (this action being between the original parties to the agreement out of which it arose) was an agreement by the plaintiff to forbear proceeding in a prosecution which he had instituted against the defendant as an innkeeper, for permitting unlawful gambling in his tavern, contrary to the public regulations which he was bound to observe.

In the second plea the defendant alleged that the note was given upon such an agreement, and added the further statement, that after getting the note, the plaintiff, contrary to his agreement, went on with the prosecution. In both pleas the defendant expressly alleged that there was no other consideration for his making the note.

The plaintiff demurred generally to both pleas.

Becher, for the demurrer, referred to 34 Geo. III., ch. 12, sec. 6, and cited *Kaye v. Boulton*, 6 T. R. 134; *Edgcombe v. Rodd*, 5 East. 294; *Beeley v. Wingfield*, 11 East. 46; *Masters v. Ibberson*, 8 C. B. 100.

Wilson, contra, cited, *Coppock v. Bower*, 4 M. & W. 361, *Davis v. Holding*, 1 M. & W. 159; *S. C. Tyrwh. & Gr.* 371.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that both the pleas demurred to are good defences, for we cannot allow the consideration set forth to have been a legal consideration.

The regulations in question were matters of public interest, not merely affecting the interest of the plaintiff. It is true there was no charge of felony involved; but that is not now held to be the test of illegality. It is equally illegal to stipulate for the compromise of a charge amounting only to a misdemeanor, if the offence is one which is injurious to the community generally, and not confined in its consequences to the prosecutor himself. None of the authorities cited by the plaintiff's counsel in the argument in the slightest degree support the validity of a note given on such a consideration as this note is pleaded to have been given upon, or shew that a court of justice would be warranted in lending its aid to enforce it. If there were other

circumstances attending the transaction which could have given a different complexion to it, the plaintiff should have replied.

Judgment for the defendant on demurrer.

THE LAW SOCIETY V. DOUGALL ET AL.

Power of the Society to make by-laws imposing term fees.

Debt on a bond, in 100*l.* penalty, given by the defendants Benjamin Dougall, Samuel Bull, and Donald McKenzie.

The conditions set out on oyer was, that the said Benjamin Dougall should well and truly pay to the Law Society of Upper Canada all fees due and payable to them by any by-laws or regulations passed by the said society, or by the benchers thereof, with the approbation of the judges as visitors ; or which might thereafter become due or payable under any by-laws or regulations thereafter to be passed ; and should observe all rules and by-laws of the society then in force, or thereafter to be passed as aforesaid, while he should continue in the books of the society as a member.

The defendants, Benjamin Dougall and Samuel Bull, pleaded separately, performance according to the condition of the bond.

The plaintiffs replied, that before the making of the bond, and after the passing of the 37 Geo. III., ch. 13, and the 2 Geo. IV., ch. 5—viz., in Trinity Term 1 & 2 W. IV.—a certain by-law or order for the government of the society was duly passed by the benchers of the said society in convocation, and was afterwards approved of by the judges, repealing so much of the rule of the society of Trinity term 37 Geo. III. as fixes the amount of the annual fee payable by members after their call to the bar ; and ordaining that in future each member, after his call, should pay, on or before the last day of Easter term, a term fee of 11*s.* 8*d.*, to be applied to the general purposes of the society, which said by-law was in force at the making of this bond ; that in Hilary term 3 W. IV. a certain other by-law was made and approved of, which enacted that the term fees

should in future be 2s. 6d. in lieu of 11s. 8d. as provided by the first mentioned by-law, and should be paid on or before the first day of Michaelmas term in each year; and the plaintiffs averred that, although the said last mentioned by-law was binding on the said Benjamin Dougall, yet that he had not paid the fees imposed by it, but that before the commencement of this suit the sum of 8*l.*, being for 64 term fees, became due and payable, and was still unpaid.

The plaintiffs demurred to this replication. Several grounds were mentioned in the note, the most important of which sufficiently appear in the judgment of the court.

Eccles, for the demurrer, cited the *King v. Miller*, 6 T. R. 268; *The London Tobacco Pipe-makers' Co. v. Woodroffe*, 7 B. & C. 838; *Carter et al. v. Sanderson*, 5 Bing. 79; *Scriveners' Co. v. Brooking*, 3 Q. B. 95; *Gerrish v. Rodman*, 3 Wils. 155; *Framework-knitters' Co. v. Green*. 1 Ld. Ray. 113; 6 Jur. 835.

Hagarty, Q. C., contra.

The statutes referred to appear in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

The bond sued on in this case was made on the 2nd of February, 1833, when Mr. Dougall was, as is recited in the condition, a member of the society, and a barrister; and on the 16th of February, 1833, the by-law was made imposing the fee for non-payment of which he and his sureties are now sued. That by-law repealed the by-law which was in force when this bond was made, so far as regards the amount of fee and time of payment; and it provided that thenceforward "the amount of the term fee to be paid under the former regulation should be 2s. 6d. instead of the 11s. 8d. required by the former regulation, and that the term fees should be all paid on or before the first day of Michaelmas term in each year." This was in effect a substantive regulation in itself imposing a fee, and directing when it should be paid; and it is stated to have been a by-law duly made and passed by the benchers in convocation, and approved of by the judges.

The first statute, 37 Geo. III. ch. 13, gives the "society"

power to frame a body of rules for its government. It provides that the six senior members, or more, of the society (which society included all the members of the bar) shall be benchers or governors, and that the attorney and solicitor general shall be benchers. It authorises all the members of the society to meet in the first instance, and make rules for their own government, with the approbation of the judges as visitors; and it allows such other rules and regulations to be made, with the sanction of the judges, as may be necessary—which rules to be made after the organization of the society, are to be made, as I apprehend, and as has always been assumed, not by the members of the bar at large, but by the governing body of the society, that is, by the benchers.

There can be no doubt about the right of the society to impose a fee on the members of the society. The statute 4 Geo. IV. ch. 3. sec. 2, expressly requires them to impose a fee, to go to the remuneration of the reporter; and we cannot deny the authority of the society to impose so very moderate a fee as 2s. 6d. each term, to form a fund for other purposes which we may suppose require to be provided for. It is a regulation of the society, of which the judges are expressly made visitors by law, and their approbation of it is conclusive, upon the principles which govern the exercise and extent of the visitorial power—conclusive at least, as regards the point of there being a reasonable ground for imposing a charge.

Then as to any question of this by-law having been duly passed: the defendant pleads nothing to shew that it has been illegally or irregularly passed: he excepts merely to the replication as not shewing *primâ facie* a valid by-law. We think there is nothing in the exception as to the attorney and solicitor general not being shewn to have been benchers when the by-law was made: the statute makes them benchers without requiring them to be otherwise appointed; and for this purpose and on these pleadings, we must intend that all was done duly and in proper order, and that the benchers, as governors *de facto*, were the proper governing body of the society. The 37th

Geo. III. ch. 13, by legal inference, we think, left all rules after those made at the organization of the society, to be made by the governing body or benchers. The 2nd Geo. IV. ch. 5, makes the corporation consist of the treasurer and benchers; but gives no direction, and imposes no restriction respecting the manner of passing by-laws. The statute 3 Vic. ch. 2, sec. 6, speaks of rules of the society as being made by the "benchers in convocation." That, therefore, is the mode which the legislature has sanctioned of designating the governing body of the society, whether they did or did not intend that the words used should necessarily include the treasurer; and we cannot hold that this replication shews an invalid by-law because it describes it as having been passed "*by the benchers*," when the legislature expressly gave that designation to the governing body; and moreover, by their bond the defendants expressly bind themselves that Mr. Dougall shall observe the by-laws passed "*by the benchers of the said society*."

We see no pretence for resisting the action, and raising an expensive litigation about a trifling fee, reasonably imposed by the society upon one of its members, who had bound himself to observe its regulations, and had obtained the privilege of admission, on the confidence that he would do what he had undertaken.

Judgment for plaintiffs on demurrer.

DOE DEM. LOUNT V. SIMPSON.

Right of defendant on the evidence to dispute plaintiff's title.

It was proved that the defendant went into possession as assignee of a person to whom the plaintiff had given a bond for a deed: that he had received indulgence as to the payments required by the bond: that he had expressly promised to go out of possession if such payments were not made; and that he was in default. This bond was in the defendant's possession and he had received notice to produce it.

Held, That under these circumstances the defendant could not dispute the plaintiff's title; and that the bond not being produced, no secondary evidence was required of its contents.

Ejectment for the easterly part of lot 34, in the 2nd concession of King, 50 acres.

The plaintiff called a witness, who proved that this

defendant had entered into possession under a person who had contracted to buy the land from the lessor of the plaintiff: that an action had been brought against the defendant a year ago, but had been delayed on the defendant's pleading poverty; and that the defendant then undertook to leave the land if he did not make payment as soon as he got in his crops: that the defendant went into possession under one Collister, the person who had bargained with the lessor of the plaintiff for the land, and to whom the latter had given a bond for a deed, which bond the witness swore was in the possession of this defendant, who had notice to produce it.

It was objected by the defendant's counsel, that this evidence was insufficient to entitle the plaintiff to a verdict; for that the bond not being produced, secondary evidence should have been given of its contents.

The learned judge directed a verdict for the plaintiff, subject to the opinion of the court upon the point, whether there was sufficient evidence to go to the jury.

J. Duggan, for the defendant, moved that a verdict be entered for the defendant upon the leave reserved.

Bell shewed cause, and cited *Slatterie v. Pooley*, 6 M. & W. 664.

ROBINSON, C. J., delivered the judgment of the court.

We think the verdict is well supported by the evidence given. If the proof had been of nothing more than that the defendant had promised that on a certain day he would go out of possession, it might have been made a question whether he was not still at liberty, on the trial, to controvert the title of the lessor of the plaintiff; but here the facts are so far before us that we see the position of the parties. It is proved, and by evidence which the cases of *Slatterie v. Pooley*, 6 M. & W. 664; *Dickinson v. Coward*, 1 B. & Al. 677; *Harvey v. Kay*, 9 B. & C. 356; *Pasmore v. Bousfield*, 1 Stark. N. P. C. 236; *Ashmore v. Hardy et al.*, 7 C. & P. 501, and many other cases, treat as clearly admissible, that these parties stood in a particular relation to each other, which gives a *prima facie* right to the lessor of the plaintiff to call upon the defendant to give up possession; leaving no

room for any other question than whether the defendant, going into possession on the footing on which he admits he did, and engaging to leave possession on a day which has passed, could be permitted to question the plaintiff's title, or to set up a title in himself, if he had offered to do so. But he offered no evidence of title. It is sworn to as a fact, that he went into possession under a person who had made a contract to purchase from the lessor of the plaintiff: that he had bought out that person, and held the bond which the lessor of the plaintiff had given to him, and which bond he had received notice to produce: that he had asked for and received indulgence in regard to payments which the bond required to have been made, on his express promise to go out of possession if he did not keep his promise, which it is sworn he did not keep. If the bond contained anything which would make in the defendant's favour, he should have shewn it. It was sworn to be in his possession, and he had notice to produce it.

Rule discharged.

THE QUEEN V. GAMBLE & BOULTON.

Privilege of members of parliament from arrest.

Members of the provincial parliament in Upper Canada have the same privilege from arrest as members of parliament in England.

One of the defendants, being a member of parliament, was arrested on the 29th of November, 1851, under an attachment issued against him as an attorney for the non-payment of a debt. The last preceding session during which he had been a member had expired on the 30th of August, 1851, and that parliament was dissolved on the 6th of November following. On the 10th of December he was again elected, and in February applied to be discharged on the ground of privilege.

Held, that he was not privileged under the first election, as at the time of arrest he was not a member, and more than forty days had elapsed from the close of the last session; but that he was entitled to his discharge as a member of the new parliament, having been arrested within forty days next before the return of the writ of election.

The return at the new election was held sufficiently proved by the affidavit of the applicant.

M. C. Cameron obtained a rule nisi to set aside the arrest of *W. H. Boulton*, Esquire, one of the defendants in this case, upon a writ of attachment which had issued, on the ground that *at the time of the arrest* the said *W. H.*

Boulton was privileged from arrest by reason of the privilege of parliament; and that *since the arrest* he had become entitled to the privilege of parliament, having been elected a member of the parliament of the province of Canada. He had moved to rescind the rule of court made in Michaelmas term last, ordering the attachment to issue, and to set aside the writ also; but the court refused a rule nisi on these matters, because the privilege, if it was a valid objection against the rule and the attachment, existed at the time the rule was pending, and was not relied upon or stated in the affidavits and papers on which it was moved.

The arrest took place on Saturday, the 29th November, 1851. The parliament was dissolved on the 6th day of that month; and the affidavits stated that Mr. Boulton was a member of that parliament; and "that the election of members for the said city," (Toronto) "as representatives thereof in the next parliament, is fixed for the ninth and tenth days of December instant;" and that he (Mr. Boulton) "is a candidate, and was put in nomination for re-election in this city, as a representative of the said city in the next parliament." The affidavit was sworn on the 2nd of December, 1851. A further affidavit, sworn on the 4th of February, 1852, shewed that Mr. Boulton was elected in December, and was still detained on the writ of attachment.

Hagarty, Q. C., and *Connor*, Q. C., shewed cause, objecting that the writ of attachment should have been moved against, not the arrest under it, on the first ground of objection; and that if the objection of privilege was not taken to the rule ordering the writ, it was waived, and could not now be urged to the arrest under it—citing *Fowell v. Petre*, 5 A. & E. 818; *South Eastern Railway Company v. Sprot*, 11 A. & E. 167; *Turquand v. Hawtrey*, 9 M. & W. 727. They argued that the privilege of freedom from arrest had never been asserted by the legislature here, nor was it an indispensably necessary privilege. That, admitting it to exist generally, it would not apply to this case, where the defendant was an attorney, and was attached for disobedience to a rule of court ordering him to pay over money to his clients, which must be looked upon as the

exercise of jurisdiction *quasi* criminal, and not civil, of the court—being a punishment; and they denied, at all events, that the privilege extended after a dissolution of parliament. They referred on the general question of parliamentary privilege, to the late edition of Hallams's Constitutional History, and the notes on the case of *Stockdale v. Hansard*: to *Howard v. Gosset*, 10 Q. B. 359. 411: *Stockdale v. Hansard*, 9 A. & E. 1; *Goudy v. Duncombe*, 1 Exch. 430: *Butcher v. Steuart*, 11 M. & W. 857; 2 Lev. 72; 1 Sid. 29; *Holliday v. Pitt*, Cas. Temp. Hardw. 28; *Executors of Skewys v. Chamond*, Dy. 57. b; 1 Bl. Com. 165; Com. Dig. Parliament. D. 17; Bac. Abr. Privilege C. 4; *Rex v. Earl Ferris*, 1 Burr. 631; *Rex v. Lord Preston*, 1 Salk. 278; *Phillips v. Wellesley*, 1 Dowl. P. C. 9. They cited also a judgment of the Court of Queen's Bench in Montreal, as adverse to the right claimed.

Vankoughnet, Q. C., contra insisted that the defendant had his privilege of freedom from arrest, and referred to the proclamations in the Gazette by which it appeared, that on the 30th of August, 1851, parliament was prorogued by his Excellency the Governor General to Wednesday, the 8th of October, 1851.

By proclamation, tested at Montreal on the 22nd of September, 1851, reciting the prorogation made on the 30th of August, to meet on the 8th of October, at Toronto, the parliament was prorogued until Monday, the 17th of November, to meet at Quebec.

By proclamation, tested at Quebec, the 6th of November, 1851, parliament was dissolved; and a writ of summons, tested the same day, was issued, calling the Parliament to meet on Wednesday, the 24th of December, 1851, at Quebec; and writs of election were issued, tested on the same day, and returnable on the 24th of December, 1851; and by a subsequent proclamation, parliament was prorogued until the 9th of March next.

He argued that immunity from arrest was as necessary here as in England: that this very privilege is in some respect assumed by the King's Bench Act of 1822, and has been recognized in a great variety of cases decided in this

court, in which it was held, that the old form of process of *capias*, though notailable, was improper to be used in suits against members : that this was a civil right under the common law of England, and therefore was part of the law of this province under statute 32 Geo. III. ch. 1.

He insisted that the defendant had forty days from the date of the dissolution, and was protected as a member of the former parliament ; and at all events, as a member of the new parliament, he was protected. He cited Pitt's case, as reported in Fortescue, 159 ; 2 Str. 988 ; Bernard v. Mordaunt, 1 Lord Ken. 125. He also referred to the case of Wadsworth et al. v. Boulton, 2 Chamb. Rep. 76, *coram* McLean, J.

DRAPER, J., delivered the judgment of the court.

The privilege claimed in this case is stated by Blackstone (1 Com. 165) to be for forty days next after every prorogation, and forty days before the next appointed meeting, " which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time." The act 12 & 13 Wm. III., ch. 3, after providing that suits may be commenced against peers or members of parliament in the intervals of sitting, provides (sec. 2) " that this act shall not extend to subject the person of any of the knights, citizens, and burgesses of the house of commons, or any other person intituled to the privilege of parliament, to be arrested during the time of privilege." And the 11th Geo. II. ch. 24, contains a similar provision. The 10th Geo. III. ch. 50, enacts that " no action, suit, or any other process or proceeding thereupon, shall at any time be impeached, stayed, or delayed by, or under colour or pretence of any privilege of parliament." The statute of 1 Jac. I. ch. 13, was passed to authorize " new executions to be sued against any which shall hereafter be delivered out of execution by privilege of parliament." And it is said in a note to the 7th edition of Bacon's Abridgment, title Privilege 6, that since that statute, no instance occurs where any person entitled to privilege, if in custody on execution, hath been delivered by any other mode than by virtue of a writ of privilege, or by a writ of *habeas corpus*,

issued in obedience to a warrant under the speaker's hand, some formal process being deemed necessary to give the act its full operation, referring to 5 Parl. Hist. 113; 1 Hats. Prec. 155.

In Pitt's case, as reported in Ridgway, Cas. Temp. Hardw. 100, Lord Harwicke, speaking of the statute 12 & 13 W. III. says, "it has provided expressly against the arrest of the person of a member; so that now this privilege is become part of a public act of parliament, which we are obliged to take notice of; and it needs not be certified to us by plea, as before the act—being then of a private nature only—though now, indeed, we cannot take notice of the person's being a member of parliament but by matter of record, which has in this case appeared to us by Mr. Pitt's return to parliament, which is the proper method," and for which he cites 1 Sid. 42; Ray. 12; Keb. 3, 13, 16, 727. It appears to me very clear, taking the law of England thus declared in connection with our own statutes referred to in argument, and the decisions of our own courts as to the process which should issue against a member of either branch of the legislature, under the act of 1822, that the privilege claimed exists, and must be allowed if a proper case is made out.

From the earliest cases down to the latest text writer, the privilege (when parliament is not sitting) seems to be founded on the giving a reasonable or convenient time for members to go home after a session, and to go from home to a meeting of parliament. What was a reasonable time was never formally decided, as regarded the commons, until the case of *Goudy v. Duncombe* (a), which in accordance with "the usage, the universally prevailing opinion on the subject," fixed on forty days as the time to be allowed before and after the meeting of parliament, during which the privilege continues. The case of *Goudy v. Duncombe* further decided, that a person elected at a general election has this privilege for forty days next before the time appointed for the meeting of the new parliament; and the defendant in that case was discharged from custody, because having been elected on the 28th of July, 1847, under

(a) 1 Exch. 430.

a writ of election returnable on the 21st of September, he had been arrested on the 2nd of September. In this respect the case differs from ours ; for the defendant here was arrested more than forty days after the close of the last proceeding session, after the dissolution and before the new election. It is true that before the arrest the old parliament had, on the 22nd of September, been further prorogued by proclamation until the 17th of November ; but that parliament had been dissolved, and a new one summoned on the 6th of November. On the day of his arrest, therefore, the defendant was not a member of parliament, so that he could have no privilege for forty days proceeding the next meeting ; and forty days had expired from the last day of the last session, so that the privilege for the purpose of returning home had expired. In *Butcher v. Stewart*, 11 M. & W. 857, the defendant was arrested within forty days after the dissolution of the parliament of which he had been a member. It does not appear by the case whether it was within forty days after the close of the last preceding session : but, in fact, parliament was dissolved the day after the close of the session, which took place on the 22nd of June, and the arrest was on the 22nd of July, 1841 ; so that neither of these cases go the length contended for, as to this defendant's privilege as a member of the preceding parliament. Pitt's case is still less an authority to this extent ; for the parliament was prorogued on the 16th of April, dissolved by a proclamation published on the 18th, and he was arrested on the 20th—only four days after the prorogation—and the court expressly discharged him, on the ground of privilege *redeundo*.

I am not therefore prepared to decide, that as a member of the old parliament Mr. Boulton is entitled to his discharge.

The remaining question is, whether, having been elected to the new parliament and arrested within forty days next before the return of the writ of election, he is entitled to be discharged ? This involves the questions—1st, Of the sufficiency of the proof that he is entitled to privilege. 2nd, Of the right to be discharged if he was properly arrested.

The language of the court in Pitt's case, and in some of

the earlier cases might raise a doubt whether a party being taken in execution or indeed arrested on mesne process, was not bound to shew his return as a member otherwise than by his affidavit.—See Bac. Abr. *ubi supra*. But in *Goudy v. Duncombe*, 5 D. & L. 209, the case seems to have been rested on affidavits only; and in *Phillips v. Wellesley*, 1 Dowl. P. C. 9, where it was clearly recognized that a party in custody in execution was entitled to his discharge on being elected a member the case appears to have been brought before the court in affidavits only: and the learned counsel who opposed the present application did not press this objection, or rest at all upon a denial that Mr. Boulton had been elected as stated in his affidavit. And therefore it all turns upon his right to be discharged.

As to this, it was objected that he was in custody for a contempt, under the authority of this court, exercised over him as an attorney of the court; and that the case was distinguishable from those in which the party had been arrested upon ordinary civil process. The very able argument of Mr. Beams, in Mr. Long Wellesley's case, 2 Russ. & M. 639, contains all the law on the subject to be found in previous cases respecting the extent to which the privilege of parliament as to freedom from arrest, extends. The only case I have seen of a later date, referring to the same question is Mr. Lechmere Charlton's case, 2 Milne & Craig 316. The cases excepted from the privilege appear to be treason, felony, refusing to give surety of the peace, all indictable offences, forcible entries and detainers, printing and publishing seditious libels, process to enforce the *habeas corpus*, and such contempts of court as the two last cited cases shew. In *Rex. v. Wilkes*, as reported in 2 Wils. 151, Lord Camden certainly treated libel as not amounting to a breach of the peace, but at most as having a tendency to disturb the peace; and probably this decision may have occasioned the resolution of the House of Commons in 1763 to except the printing and publishing of seditious libels from the cases to which privilege of parliament extended. Magistrates, however, were in the habit of arresting parties for libels, before indictment found; and, though their

authority to do so was brought in question after the decision of the case of *Rex. v. Wilkes*, it was maintained by a most elaborate judgment in *Butt v. Conant*, 1 B. & B. 548.

But that this is not such a contempt as is excepted from the privilege claimed, is clear from the words of the Lord Chancellor, in giving judgment in *Mr. Long Wellesly's* case, when he says, (a) "To those who argue on the other side I at once make a present of almost all that Mr. Beames urged this morning, as to commitments for refusing to put in an answer, for *refusing to pay money ordered to be paid*, for resisting a decree to perform any specific act, for cutting down timber, or doing any other act in the face of an injunction, or in the face of any other order of the court. The breach of any order substantially of a civil description, and in a civil matter—that is, a matter touching the rights of real or personal property—will not entitle this court, the Court of King's Bench, the Common Bench, the Exchequer of the King, nay, not even in the House of Lords itself, judging in the last resort, to attach the person of the party having privilege of parliament, and disobeying such an order." And in another part of the same judgment, "Against all civil process privilege protects; but against contempt for not obeying civil process—if that contempt is in its nature or by its incidents criminal—privilege protects not; he who has privilege of parliament, in all civil matters—matters which, whatever be the form, are in substance of a civil nature, may plead it with success; but he can in no criminal matter be heard to urge such privilege." (b) *Catmur v. Knatchbull*, 7 T. R. 448, and *Walker v. Lord Grosvenor*, 7 T. R. 171, illustrate the principle—both being cases of non-performance of an award made a rule of court. I cannot see that the fact that Mr. Boulton is an attorney of this court can make any difference; for the attachment is only in the nature of a civil process to enforce a civil remedy—viz., the payment of a debt.

I have not failed to consider the judgment of the Court of Queen's Bench, in *Montreal*, in the case of *Cuvillier v. Monro*, which was pressed on our attention in the argument, and in which that court held that the defendant was not

(a) 2 Russ. & M. 661. (b) P. 665.

entitled to his discharge from arrest on mesne process on the ground of his privilege as a member of parliament: and the following summary was given of the conclusions at which the court had arrived—1st, That the privilege from arrest on civil process does not attach to members of the Legislative Assembly by virtue of any law, jurisprudence, or usage. 2nd, Nor by legal incident nor analogy between it and the Imperial Parliament. 3rd, It does attach on the ground of necessity, to the extent of such necessity, and not beyond. 4th. The case of the petitioner does not fall within the rule, it appearing, in another part of the judgment, that the arrest took place twenty days after one, and twenty days before the time fixed by another proclamation for the meeting of the house: but it also appearing that the defendant at the time of his arrest, was neither going to nor returning from parliament; and neither proclamation calling parliament to meet for the despatch of business. I have no intention, and indeed it would be highly presumptuous in me to question the correctness of that decision according to the law which that court is bound to administer. Another system of jurisprudence, and other laws, govern the decisions of this court. We are bound by the law of England where there are no enactments to the contrary, and the *lex parliamenti* is a part of that law. The latest decisions in England establish what is the convenient and necessary period during which privilege from arrest lasts; and while, apart from our own statutes and judicial decisions, I see nothing in the decisions in *Beaumont v. Barrett et al.*, 1 Moore P. C. Ca. 59, or the more recent case of *Kielly v. Carson*, 7 Jur. 137, at variance with the assertion and enjoyment of this privilege by our legislature, I am confirmed in my opinion of its existence by our general adoption of the law of England, by the provision for suits against privileged parties contained in our statute of 1822, and in the statutes of Canada, 12 Vic., ch. 63, secs. 22 & 23; 13 & 14 Vic., ch. 55, sec. 96; and by the uniform decisions of our courts since the former act, and also, as I am informed, before it. There is certainly an anomaly that, in one part of the Province of Canada a different rule will prevail, as to the

extent of this privilege, from that which will govern in the other. But with that we have no concern. We must administer the law as we find it, and leave to the legislature the decision as to the propriety of changing it.

In my opinion, Mr. Boulton is entitled to be discharged as a member of the present parliament.

MITCHELL V. NOBLE ET AL.

Recognizance of bail taken after judgment—Averment of suit pleading.

Debt on a recognizance of bail. The declaration set out the condition "that if it should happen that the said D. M. should be convicted at the suit of the plaintiff, in a certain plea of trespass in the case upon promises, to the plaintiff's damage of 100*l.*, then the defendants consented and agreed that all such damages as should be adjudged unto the said plaintiff," &c.

Held—the pleas being specially demurred to—that it was sufficiently averred that the recognizance was entered into in a suit *then pending* between the plaintiff and the principal ; and that the defendants were therefore estopped from pleading that at the time of making the recognizance there was no such action.

The defendants pleaded, that the debtor was surrendered within the time in which he could be *lawfully* surrendered, and that he was afterwards discharged as an insolvent debtor.

Held on special demurrer, plea bad.

Semble, That the defence intended to be set up is not sufficiently brought out by the pleas in this case.

Debt on a recognizance of bail entered into by the defendants for one Donald McDuffie. The condition set out was, "that if it should happen that the said D. M. should be convicted at the suit of the said plaintiff, in a certain plea of trespass on the case upon promises, to the plaintiff's damage of 100*l.*, in the said court, by and at the suit of the said plaintiff against the said D. M., then the said defendants consented and agreed that all such damages as should be adjudged unto the said plaintiff should be made of their goods and chattels," &c., &c.

2nd plea, That at the time of making the said recognizance, as in the declaration alleged, there was no action pending in the said Court of Q. B. at Toronto, at the suit of the plaintiff against the said D. M.—verification.

5th plea, That the defendants entered into the recognizance after the recovery of judgment by the plaintiff against the said D. M.

6th plea, same as the last, but setting out the dates of the recognizance and of the judgment.

7th plea, That after entering into the said recognizance, and within the time in which the said D. M. could be lawfully surrendered in discharge of such bail as aforesaid, the said D. M. was duly surrendered to the custody of the sheriff, and notice thereof given to the plaintiff; and that he was afterwards discharged under 10 & 11 Vic., ch. 15, as an insolvent debtor.

Special demurrer to each of these pleas, assigning for causes, as to the 2nd, 5th, and 6th, that the defendants are estopped from denying the averments of the several matters in the recognizance contained: that an immaterial issue is offered: and that no matter is shewn in denial, or in confession and avoidance of the cause of action.

And as to the 7th plea, that it offers no defence to the action, as the defendants could not be legally discharged from liability until an *exoneretur* had been entered on the recognizance, which is not stated to have been done: and that it is double, for attempting to put in issue the surrender of the principal, and also that the said D. M. was discharged from custody under the provisions of the act therein mentioned.

Hector, for the demurrer, cited *Mitchell v. Noble et al.*, 1 Chamber Rep. 284; *Todd v. Etherington*, 2 Marshall, 374; *Davis v. Fowler*, 2 Chy. Rep. 74.

J. Boulton, contra, cited *Simmons v. Middleton et al.*, 1 Wills. 269; *Bailley v. Smeathman*, 4 Bur. 2134; *Lardner v. Bassage*, 2 H. Bl. 593.

ROBINSON, C. J., delivered the judgment of the court.

The second plea sets up as a defence, that at the time of the recognizance being entered into there was no action pending in the Queen's Bench, at Toronto, at the suit of this plaintiff against McDuffie, and concludes with a verification. I do not know why the plaintiff should have omitted, in his declaration, what forms a part of all declaration on recognizances of bail that I have seen—namely, that the recognizance was given “in a certain action of, &c., then pending at the suit of the plaintiff against the principal.” If it was thought that that would be inaccurate in this case, when the recognizance was in fact given (as it legally may

be (after judgment, then there should have been at least a statement suited to the circumstances ; for, as the declaration stands, it leaves room for the objection, that, for all that appears, the recognizance was given illegally, not being in any action that has ever been instituted ; and the omission weakens the plaintiff's objection to this plea on the ground of estoppel, for in fact the declaration does not set forth a recognizance in which the bail have in the usual terms admitted a suit to be pending. We think, however, that although it is not, in the ordinary manner, explicitly averred that the recognizance was entered into in a certain suit between the plaintiff and McDuffie, yet that, upon a general demurrer we may hold that the statement does amount to that ; for that the statement that the condition was, "that if McDuffie should be convicted at the suit of the plaintiff, in a *certain plea* of trespass on the case upon promises to the plaintiff's damage of 100l., in the said court, at the suit of the plaintiff against the said McDuffie," may be taken to refer to a suit described in the recognizance as pending in the court, and not to one which for all that appears, might be yet to be commenced.

Then, if we can properly gather from the declaration, as we think we can, that there was such an action pending in the court, or rather that the recognizance itself professes to be in an action which had been actually instituted, it follows that the defendants who entered into that recognizance, are estopped from pleading that there was no such action. I suppose the defendants intended by the second plea to set up as an objection that judgment having been in fact given in the cause before the recognizance of bail was taken the suit was no longer pending, and so that the recognizance in its terms could not be applicable ; in short, to set up in this plea the same defence in substance as that intended to be advanced on the 5th and 6th pleas. The plea, however does not sufficiently bring out that defence. It may, for anything that is stated in it, be intended by it to deny the existence of such a suit ; but the defendants, by becoming bail in the suit, are estopped from denying that there was then a suit in such a sense pending as that a recognizance could be properly taken in it :

The fifth and sixth pleas set up the same defence, and bring up the same question; the only difference being, that in the former the defendants say in general terms that they entered into the recognizance after judgment in the original cause, and in the latter they shew the facts by specifying the dates of the recognizance and of the judgment. The defendants in the pleas state merely this fact, and state nothing more; they do not bring their defence to a point. They do not shew how they intend to apply the fact pleaded as a defence or what inference they desired to be drawn from it; they leave us to conjecture what they mean. They should have stated why and how, that bars the plaintiff's action. If they mean that a recognizance of bail that is taken after judgment cannot be binding, they are in error; for it is plain that bail may be put in after judgment, though it had been doubted at one time whether it could be done. They may mean, as I suppose they do, that the judgment being entered before the recognizance was taken, the condition which binds the bail to pay any sum that the defendant *shall be* condemned in, is inapplicable. They are relying, I apprehend, on the same defence as they intended to set up in the second plea, though advanced in another form. If that was meant, then the defendants I think, should have asserted what they contend to be the legal effect, and not have left the court to guess the defence intended.

But if it be the duty of the court to compare one part of the record with another, and thereby endeavour to find out what these pleas mean, then the question is, whether we may not take it to be the legal effect of the recognizance, that McDuffie was to pay up the judgment rendered, or to be rendered in that cause or to surrender himself. I consider that the recognizance having stated as a contingency what had already happened would not make it a void proceeding, or tie the parties up to the immaterial point, whether the judgment was entered at one time or another; the real substance of the pleading being, whether the plaintiff had recovered judgment in that action.

The seventh plea, we think, is certainly insufficient; for it does not shew the render to have been made within such time as it could be made of right, so as to bar the action;

but that the debtor was surrendered within the time that he could be *lawfully* surrendered, which means a different thing. The plea, besides, is double, as the plaintiff contends it is; for we cannot imagine why the defendants should have pleaded McDuffie's discharge under the insolvent act, unless he means to rely on it as a defence, and it is clearly not pleadable in discharge. The question whether the render was made in due time or not, does not come up, because the precise state of facts is not shewn. The defendants do not tell us when the render was made. The writ of *ca. sa.*, in order to charge bail, was necessarily made returnable on a certain day, and the defendants should have shewn a render before that day, in order to make their plea of render a good plea in bar, though the bail would be relieved on applying to the equitable jurisdiction of the court, if the render took place at any time before the return of process against themselves.

Judgment for the plaintiffs on demurrer.

DOE DEM. ELMSLEY ET UX. V. MCKENZIE.

Fi. Fa., amendment of—Sale under, while erroneous.

On a judgment in assumpsit a *fi. fa.* was issued in debt, and afterwards amended by rule of court. Before the amendment the sheriff had sold the land and given a deed, under which the plaintiff claimed. It was objected that the sale was void, having been made under an erroneous writ, but held that the objection could not be entertained.

And *quere*, whether the sale would have been voidable if moved against at the time of making the application to amend.

The land in question was granted to Robert Randall, by letters patent, dated the 26th of February, 1809.

A judgment was entered on the 15th of November, 1819, in a suit of Thomas Clarke v. Robert Randall, in assumpsit, for 459*l.* 9*s.* 4*d.* damages and costs, and a writ of *fi. fa.* against goods issued to the sheriff of Niagara, returnable on the 1st of Hilary Term, 60 Geo. III., and returned *nulla bona*; whereupon a writ of *fi. fa.* against lands issued, directed to the sheriff of Niagara, returnable on the 1st of Easter Term, 1820, and a writ of *fi. fa.* against lands directed to the Sheriff of Johnstown, returnable on the last day of Hilary Term, 1822; and, on the 17th of March, 6 Geo. IV., the

sheriff of the Johnstown district returned, that, by virtue of the writ to him directed, he had seized and taken into his hands and possession, on the 1st of April, 1821, the lands and tenements of Robert Randall in Nepean and Young, and had sold a part thereof at public sale, to the value of 32*l.* 10*s.*, and that the residue of the lands still remained in his hands for want of buyers. All this appeared by an exemplification of the judgment roll.

A separate exemplification of the writ was put in, tested 13 January, 1 Geo. IV., returnable last of Hilary, 1822, to levy 482*l.* 12*s.* 10*d.*, which Thomas Clarke had recovered for the not performing certain promises, &c.; and the sheriff was commanded to have the money to render to Thomas Clarke "for his debt and damages aforesaid;" on which writ a return like that exemplified above was endorsed.

A deed, dated 14th May, 1822, from John Stuart, sheriff of the district of Johnstown, was proved by the subscribing witness; whereby, after reciting that a writ tested 13th January, 1 Geo. IV., at the suit of Thomas Clarke against the lands and tenements of Robert Randall, was delivered to him, by virtue whereof he seized Nos. 10 & 11 in the 1st concession on the Rideau, containing about 100 acres, and the easternmost three-quarters of No. 10 in the 2nd concession, containing 150 acres, and other lands; that he caused said lands to be advertised for sale on the 6th of May, 1822; and that the said lands being then put up for sale, Levius P. Sherwood, of Elizabethtown, Esq., became the purchaser, at the price of 32*l.* 10*s.*: the sheriff, by virtue of the said writ of execution, and in consideration of the said sum of 32*l.* 10*s.*, paid, &c., granted, bargained, sold, and conveyed to the said L. P. Sherwood, his heirs and assigns, the said lands, and all the right, property, interest, claim, and demand whatsoever, of him the said sheriff, by virtue of the writ of execution aforesaid in the same lands, *habendum* in fee; which deed was registered on the 16th of May, 1822.

Attached to this deed was a copy of a writ, to which was appended the following certificate: "I certify the above to be a true copy of the original *fieri facias* to me directed,

(Signed) John Stuart, Sheriff, District Johnstown." And that copy was of a writ in *debt*, and not in *assumpsit*;—in all other respects like the one exemplified.

It was proved that by a rule of court made in April, 1828, this writ of *fi. fa.* against lands, under which the sale had taken place had been amended so as to correspond with the judgment; and, from the exemplified copy put in, it was clear enough this has been only partially done as the writ ended in *debt*, though in all other respects it appeared to be in *assumpsit*. But it was objected that this amendment did not make a good sale which was made under the writ in its erroneous form; and that by the evidence, even on the plaintiff's case, it appeared that the sale was not made under a writ such as was exemplified.

A verdict was given for the plaintiff, leave being reserved to move for a nonsuit.

Richards moved for a nonsuit upon the leave reserved, or for a new trial on the law and evidence.

Vankoughnet, Q. C., shewed cause, and cited *Bicknell v. Wetherell*, 1 Q. B. 914; *Thorpe v. Hooke*, 1 Dowl. P. C. 501; *Englehart v. Dunbar*, 2 Dowl. P. C. 202.

DRAPER, J., delivered the judgment of the court.

I do not think the objection can prevail. There was a good judgment and a writ which in itself was sufficient to warrant the sheriff's selling, though it did not in form follow the judgment. This error in the writ the court treated as an irregularity merely, and amended it; and if there then was an objection to the sale, it should have been moved against. I do not certainly consider the sale void. I am not even prepared to say it was voidable had the court been moved, when the application was made to amend the writ to set the sale aside. But now I do not think we can entertain the objection at all. It would in fact be to allow the exemplification to be contradicted by parol evidence. I think that, on the facts appearing in evidence the sale is valid. I use the expression on the facts appearing, because some evidence was given at the trial, but not enough to establish the matter, that there had been a mortgage given on one or other of these lots, and which may have been

in existence and valid at the time of the sheriff's sale, and which, as to the lands included therein may make the sale inoperative and void. I allude to this merely to prevent it being supposed that I treat the sale as valid if such a mortgage were proved to have existed, and to have passed an estate in any of these lands out of the grantee of the crown which estate was outstanding at the time of the sale.

Per Cur.—Rule discharged (a).

IN RE MCGILL AND THE MUNICIPAL COUNCIL OF THE COUNTY OF PETERBOROUGH.

Quashing—Repealed by-law.

The court discharged, with costs, a rule for quashing a by-law of a district council, where it appeared that such by-law had been absolutely repealed before the 12 Vic. ch. 81.

Last term (Michaelmas, 1851), Mr. *Hagarty* obtained a rule nisi to quash a by-law of the district council of the district of Colborne, passed the 11th of November, 1842, for levying rates and assessments on land and other ratable property in the said district.

This was the same by-law which this court, in their judgment given in the case of *Doe dem. McGill v. Laughton (b)*, held to be illegal and invalid, and that a sale of land for arrears of taxes imposed by it was void, for reasons fully stated in the judgment.

Vankoughnet, Q. C. contra.

It was shewn for cause against this rule for quashing the by-law, that on the 8th of February, 1848, the by-law, which is now moved against, was repealed by a b-law of the Municipal Council of Peterborough, and that such repeal was absolute and without reservation.

ROBINSON, C. J., delivered the judgment of the court.

The statute 12 Vic. ch. 81, sec. 165, only gives the courts power to quash such by-laws, passed by the district councils, as were unrepealed when that act was passed. This by-law, having been repealed in 1848, was not unrepealed

(a) See *Arnell v. Weatherby*, 1 C. M. & R. 831; 5 Tyr. 485 S. C.; *McCormack v. Melton*, 1 A. & E. 331; *Mouys v. Leake*, 8 T. R. 416 n.; *Atkinson v. Newton*, 2 B. & P. 336; *Evans v. Davis* 5 Bing. N. C. 229; *Webb v. Taylor*, 1 D. & L. 676.

(b) *Ante* p. 91.

when the statute was passed; and it would be strange indeed if the legislature had left matters in that state, that we must quash a by-law, and make the council pay the expense of its being quashed, when it has long ago been repealed by the council itself, and has now no existence for any purpose.

Rule discharged, with costs.

McKECHNIE ET AL. V. McKEYES.

*Obstruction of water-course—Right claimed bad for uncertainty.—10 & 11
Vic. ch. 5.*

Wherever a right to interfere with the natural course of a stream is attempted to be founded upon prescription, the exercise of such right must be shewn throughout the period (with the exception which the statute allows) to the full extent claimed.

Case.—The declaration stated that the plaintiffs were lawfully possessed of a woollen mill and manufactory, with the appurtenances, and entitled to have and enjoy a certain water-course which had been accustomed to flow, and still ought to flow, to the plaintiffs' mill to supply the same; and that the defendant was possessed of a certain mill-dam, and certain gates, hatches, and erections across a tributary stream of the said water course, higher up than the plaintiffs' mill; yet that the defendant intending, &c., wrongfully kept and continued the said dam, &c., for a long space of time, shut up and closed, and thereby penned back and prevented the water of the said tributary stream from flowing to the plaintiffs' mill in its accustomed course; by reason whereof, &c.

Plea.—That before and at the time of the said supposed grievances, the defendant was and is the occupier of a certain close through which the said tributary stream runs; and that the defendant and all others, the occupiers for the time being of the said close for the period of twenty years next before the commencement of this suit, enjoyed as of right and without interruption the right of from time to time as occasion required keeping and continuing set up and closed certain mill-dams, &c., across the said stream, and thereby penning back the water to such extent and for such time

as was necessary to enable the said occupiers for the time being to use a mill upon the said close : and the defendant says that at the said time when, &c., it became and was necessary, for the purpose of using a mill upon the said close, to obstruct the water by closing up the said dam ; wherefore the defendant at the said times when, &c., did keep and continue set up and closed the said mill dam, and thereby necessarily penned back and stopped the said water for such extent and time as was necessary for the purpose of making full and proper use of the said mill, and no greater as he lawfully might ; *quæ sunt eadem*, &c.

Special demurrer, assigning for causes, that the right claimed is not alleged with sufficient certainty : that the defendant should have stated and shewed the height, dimensions, or other certain description, of the dams, hatches, gates, and erections, whereby he claims to obstruct the natural flow of the said stream : that the allegation that the defendant and all others, the said occupiers &c., had a right to stop the water to such an extent and for such a time as was necessary to work a mill on the said close, is insufficient and uncertain, unless the defendant had somewhere stated in his said plea, either that the quantities of water or period of such stoppages were equally extensive or of equal frequency and duration throughout the said twenty years or that there was not a greater necessity at the said times when, &c., for a more extensive supply of water to the defendant's mill than theretofore enjoyed : also, that a traverse of the said right would raise an immaterial issue—namely, as to whether the quantity of water which each of such occupiers required for the use of his mill was necessary at the time being or not—and such issue would not raise the question as to a continuous user for the period of twenty years to the same extent ; and that the said plea does not offer as a defence a right claimed by a continuous user of twenty years, to the same extent throughout ; but the said alleged right is made to depend on the wants of the occupiers for the time being, which may or may not have been continuous and consistent ; and if not, then there would be no user or right in respect thereof beyond the

minimum : also, that it is not alleged with sufficient certainty, that the defendant or any other occupiers of the said close, held and enjoyed a mill on the said close throughout the said twenty years ; nor that such mill, nor any mill, was in existence during that time ; nor that the defendants, or any other the occupiers, where entitled to the right claimed by reason of the occupation of such close, or while they occupied such close, or by reason of the possession of such mill ; and that it is not averred that the defendants committed the acts complained of as of right ; also, that the said plea is an argumentative denial of the right claimed in the declaration, to have a regular flow of the water at all times ; and that it is not a good plea in confession and avoidance, because no colour is given.

Cameron, Q. C., for the demurrer, cited *Embrey et al. v. Owen*, 20 L. J. Ex. 212.

Vankoughnet, Q. C., contra, cited *Lawrence v. The Great Northern Railway Company*, 15 Jur. 653 ; *Ward v. Robins*, 15 M. & W. 237.

ROBINSON, C. J., delivered the judgment of the court.

The defendant's counsel on the argument seemed to think that this plea was not sustainable, and we think it clear that it does not shew a good defence, for the reasons stated in the demurrer.

Whatever may be the real or apparent difficulty of distinguishing this case from *Ward v. Robins*, 15 M. & W. 237, we take it to be settled, that any one claiming to interfere with the natural right of another to have a stream of water flow in its usual course through his land must shew a foundation for his claim, either by grant, or by actual uninterrupted user and enjoyment for 20 years, to the full extent of the privilege which he claims. This plea certainly sets up neither defence, but is grounded on the assertion of a right which has been slumbering, and, for all that appears, never before exercised to the present extent, if to any extent, and of which, if advanced as a mere right, not acquired by actual user, the origin is not shewn. If this plea could be held good, then it must follow that the proprietor of land on a stream might say, that although he

had never before dammed up the water to a greater height than five feet, yet that he had in fact always dammed it up as much as he wished, or had occasion to do, for that it had hitherto been his desire to have it only that height, but that he had lately put up a dam ten feet high because he then desired to have one that height; and that this was only an exercise of the same right he had enjoyed for twenty years, to have it of whatever height he pleased. Such a plea is neither founded on a grant, nor on a user.

The decision in *Ward v. Robins* turned on a point wholly irrelevant to the question raised here—a singular difficulty, created by an inaccurate provision in the late English proscription act, and which might equally apply in a similar case under our own statute 10 & 11 Vic. ch. 5, for the language of both is the same, directing, or rather allowing, the period of twenty years to be reckoned down to the bringing of the action, and not to be committing of the injury which is attempted to be justified by the long user. The court held there, that in consequence of those words in the statute, the plea setting up a right as existing only at the time of action brought was not equivalent to a denial of the right which the plaintiff had asserted, and so was not an argumentative plea. But the right which the plaintiff was asserting in that case was not to have the water flow in its natural cause, but the right to keep up a weir which obstructed it, and such right he could only have by grant or long user. It seems, therefore, to have been conceded by the court that the plea was good, which asserted a right in the defendant to lower the weir to any extent he found necessary for irrigating his land; because that was a denial of the plaintiff having acquired the peculiar privilege which he claimed, to the extent which he had asserted; and the level to which the weir must be reduced in order to let in water to irrigate the adjoining close must, in the nature of things, be uniform. We have no doubt that the plea in this case is bad.

Judgment for the plaintiffs on demurrer.

THE CANADA COMPANY V. THE MUNICIPAL COUNCIL OF THE COUNTY OF OXFORD.

By-Law repealed and revived—No sum limited—Quashed.

A District Council passed a by-law imposing a tax on certain lands, but limiting no sum to be raised. By two subsequent by-laws this was repealed and again revived.

Held, that the last by-law must be quashed, notwithstanding that the applicants had paid part of the tax imposed by the first.

Cameron, Q.C., moved to quash certain by-laws, on the ground that no specified sum is limited to be raised by such by-laws : that they impose a rate to be levied *annually* and not for any one year only : that the purposes for which the money is to be raised are undefined ; and that the district councils had no power to impose a rate for the general purposes for the district.

On the 12th of August, 1842, the District Council of the District of Brock passed a by-law "for imposing a tax of *one penny farthing per acre* annually on all lands within the district of Brock, for the general purposes of the district, and for the purpose therein named."

This by-law was passed under the authority of the statute 4 & 5 Vic. ch. 10.

It enacted that there should be raised and levied annually for the general purposes of the district, a sum equal in amount to on penny farthing an acre on all lands within the district of Brock liable to assessment ; and that all lands within the said district so liable to be assessed should be assessed $1\frac{1}{4}d.$ per acre annually, for the general purposes of the district ; and that the same should be raised, collected, and levied in the same manner as rates and assessments had theretofore been raised, levied, and collected : *provided* that this tax of $1\frac{1}{4}d.$ an acre shall not be construed to include the tax of one penny in the pound theretofore levied by the justices of the peace on other assessable property exclusive of lands, which shall continue to be levied and collected on all assessable property except lands : *provided* also, that this by-law shall not effect the levying of the taxes theretofore levied by the justices of the peace for the erection of the gaol and court house in the district of Brock, and for the lunatic asylum.

On the 12th of February, 1846, a by-law was passed simply repealing the above law ; and, on the 12th August, 1846, the District Council of the District of Brock passed a by-law “ to revive in part a by-law repealed by the first by-law passed in the year 1846” (meaning the by-law last above mentioned). This by-law of the 12th of August, 1846, recited, that it was necessary and expedient “ to revive in part a by-law by the repealing of a by-law thereafter mentioned, and in which no provision was made for collecting arrearages due by absentee landholders, thereby committing injustice to resident rate-payers and to those who have paid their taxes regularly and thus holding out an inducement to non-residents to evade the tax ;” and it enacted that the above by-law, passed on the 12th of February, 1846, repealing the first by-law of the 12th of August, 1842, “shall be, and the same is hereby repealed : *provided* nevertheless, that the by-law repealed by the said by-law shall remain repealed so far as the imposition of taxes is concerned, and shall not be construed to revive any portions of the said by-law other than that enabling the treasurer to collect the arrearages due by the said imposition.”

2ndly, That the treasurer is thereby authorized to collect all arrearages of taxes due under the authority of the said by-law, in the same manner as if the same had never been repealed.

The by-law of the 12th of August, 1842, was described in the rule as having been passed on the 12th of February in that year.

Read shewed cause, and cited *The Queen v. Preston*, 20 L. J. (Q. B.) 17.

On the part of the defendants an affidavit was filed, that no such by-law as that first set out was passed by the district council in *February*, 1842. It seemed that, by mistake, the county clerk of Oxford, in certifying the copy of the by-law referred to for the purposes of this application, described it as having been passed on the 12th of *February*, 1842, when it should have been described as passed of the 12th of August, 1842. They filed another affidavit on the treasurer of the county of Oxford, that he was treasurer of

the district council in 1842, and continued to be such treasurer up to and in 1849, and from thence hitherto : that on the 10th of January, 1849, the agent of the Canada Company paid to him, as treasurer, 103*l.* 2*s.* 0¼*d.*, being the municipal tax of 1¼*d.* per acre raised under and by virtue of a by-law passed on the 12th of August, 1842, on lands belonging to the Canada Company, after deducting thereout the 1*d.* in the pound levied under the statute of Upper Canada, 59 Geo. III., ch. 7 ; and that when such payment was made the Canada Company was fully aware of the existence of the said by-law passed on the 12th of August, 1842.

ROBINSON, C. J., delivered the judgment of the court.

There is no doubt that the by-law of 1842 was illegal, because it limited no amount to be raised, and so was directly repugnant to the 41st clause of 4 & 5 Vic., ch. 10, and was therefore void and of no effect, according to the express enactment in the 47th clause of the same statute ; and on other grounds that by-law was illegal. Then the district council repealed it in 1846 ; but soon afterwards, reflecting that though the imposition of further rates under it had ceased with its repeal yet the council had thereby lost the means of enforcing payment of rates accrued under it while it was in force, and so those who had paid in obedience to it, and those who had refused or neglected to do so, were on unequal terms, they restored it to force so far as was necessary for collecting arrears, by their by-law of the 12th August, 1846.

This by-law is moved against, and we think we have no discretion to decline quashing it, for it is passed to enforce an illegal by-law and cannot therefore be in itself legal. As to the answer, that the Canada Company has submitted to the by-law, and so has no motive for now applying against it, the affidavit does not go so far as to shew that all the taxes have been paid by them that they would be liable to under it, but only that they have paid 101*l.* for rates on several thousand acres. This may yet leave further payments to be claimed.

Per Cur.—Rule absolute.

JOHN TORRANCE AND DAVID TORRANCE V. PRIVAT.

Statute of Limitations, 21 Jac. I. c. 16.

Whenever a plaintiff comes within the jurisdiction the Statute of Limitations begins to run, and he cannot urge as an excuse that he did not remain long enough to sue.

It is not necessary to shew that the defendant was also within the province when the plaintiff came, unless such issue is expressly raised.

Appeal from the County Court of the County of York.

Assumpsit on a promissory note for 21*l.* 17*s.* 6*d.*, made by the defendant on the 20th of March, 1837, payable three months after date to the plaintiffs.

The defendant pleaded the Statute of Limitations, to which the plaintiffs replied that when the cause of action accrued they were out of Upper Canada, and had not, nor had either of them, come to that part of the province until within six years of the commencement of the suit.

The defendant rejoined that one of the plaintiffs, John Torrance did come to Upper Canada after the cause of action had accrued, and upward of six years before the commencement of this suit, and on this issue was joined.

A witness was called for the defendant, and his evidence, as reported, was to the effect that John Torrance was at Niagara in 1838; that he came to attend a sale of lands, and remained there a night and part of two days.

A verdict was given by consent for the plaintiffs, with leave to move to enter a verdict for the defendant.

On motion by the defendant, a verdict was afterwards ordered to be entered in his favour, pursuant to the leave reserved.

From this decision the plaintiffs appealed.

Galt for the appeal.

Connor, Q. C., contra, cited *Gregory v. Hurrill*, 5 B. & C. 341: *Lane et al v. Jarvis*, 5 U. C. R. 127.

ROBINSON, C. J., delivered the judgment of the court.

We think the learned Judge was right in directing the verdict for the defendant. The plaintiff must have known that he was himself within our jurisdiction, and had it therefore in his power to take his remedy, and it is no

excuse in his mouth that he did not stay long enough to do it, for that was his own choice.

As to the objection that it was not shewn that the defendant Privat was also in the province at the time that the plaintiff came here, there can be nothing in that, for there is no enquiry respecting his presence or absence open upon these pleadings; the issue is simply upon the fact whether this plaintiff was within Upper Canada more than six years before this action brought. Nothing appears on the record or evidence to shew that the defendant has not been always in Upper Canada, or that the note was not made here, and nothing as to his place of residence is involved in the issue. It would seem from Mr. Lockhart's evidence, as reported, that John Torrance was in Upper Canada also in June, 1843, which would equally shew the six years expired; but there may have been some mistake about that in noting the evidence. The cases cited which have arisen upon the fact of the defendant's return to, or coming within the jurisdiction, bring up very different considerations; in applying the exception introduced by the stat. 4 Ann, ch. 16: because it is to little purpose to shew that a defendant has been within the jurisdiction within the six years, unless he has been openly so, and for such a time as that the plaintiff, by any reasonable diligence, could have learned the fact, and availed himself of it. The cases cited, including that of Gregory v. Hurrill, 5 B. & C. 341, were all cases that turned upon the fact of the defendant's coming within the jurisdiction.

The exception in favour of a plaintiff on the ground of his own absence is certainly not one to be favoured, because in almost every case he might just as well take his remedy by sending instructions from a foreign country, as by coming in person. Of course he is entitled to the letter of the statute in his favour, and nothing more, and the effect of that is, that if he is out of the jurisdiction when his cause of action commenced, the statute will not run against him till he has come within the jurisdiction.

Appeal dismissed with costs.

TYLEE V. THE MUNICIPAL COUNCIL OF THE COUNTY OF WATERLOO.

By-laws passed to impose rates under 4 & 5 Vic. ch. 10 & 12 Vic. ch. 81—Quashed.

By-laws quashed:—1. As contrary to the 4th & 5th Vic. ch. 10, in not limiting the sum to be raised, and in imposing a tax on wild lands alone : 2. As exceeding the authority given to the district councils by the 48th section of that act : 3. As inconsistent with the requirement of 12 Vic. ch. 81, in not specifying the sum required, or the purpose to which it was to be applied. [And *semble* that it is necessary under this act (sec. 41, sub-sec. 22), as it was under 4 & 5 Vic. ch. 10, that the sum to be raised should be specified in the by-law, and then a rate authorized for raising it] : 4. For taxing certain townships for certain sums, without shewing for what purpose the money was required.

Cameron, Q. C., moved to quash the following by-laws :

1. A by-law passed by the district council of the district of Wellington, on the 12th of August, 1842, intituled “a by-law to equalize the tax on all lands.”

It recited the assessment act, 59 Geo. III., ch. 7, rating cultivated lands at 20s. per acre, and uncultivated land at 4s. per acre, being equal to one penny per acre on the first, and 1-5th of a penny on the second, and enacted “that there be raised for the current expenses of the district a sum of money equal to 4-5ths of a penny per acre per annum on all uncultivated land within the district, not exempted by statute, in addition to the tax at present in force on the said lands ;” and that such 4-5ths of a penny per acre should be raised, &c.; in the same manner as rates and assessments had theretofore been raised, collected, and levied.

2. A by-law passed by the district council of the district of Wellington, on the 9th of October, 1849, intituled “by-law to raise a sum of money in several townships in this district, for the improvements therein.”

It enacted, under authority of 4 & 5 Vic. ch. 10, and 9 Vic. ch. 40, that the townships of Waterloo, Eramosa, Nichol, Arthur, Normanby, Egremont, Bentinck, Glenelg, Sullivan, Holland, Derby, Sydenham, Puslinch, Wilmot, Wellesley, and Mornington, be assessed the sum of one farthing in the pound ; and that the township of Woolwich, and the united townships of Peel and Maryborough, be assessed the sum of one half-penny in the pound ; and the town and township of Guelph three farthings in the pound ;

and that out of the money arising from the said assessment 50*l.* should be appropriated towards the erection of the grammar school in Guelph ; and that the moneys arising from the said assessment be at the disposal of the councillors for the several townships in which such moneys are raised, for the purpose of paying for improvements contracted for and not finished, or completed and not paid for, and that the balance should be at the disposal of the future township councils, and subject to their order ; and that out of the proceeds of the assessment the townships of Arthur, Normanby, Bentinck, Glenelg, Holland, Sullivan, Egremont, Derby, and Sydenham, should pay the sum of 40*l.* towards the erection of the Maitland bridge, and that the said 40*l.* should be paid by these townships in proportion to the amount of their assessments.

3. A by-law passed on the 31st of January, 1850, by the municipal council of the county of Waterloo, intituled "by-law to impose a tax on the ratable property of the county, to meet the current expenses of the county for the year ending the 31st of December, 1850."

This enacted that 1*d* in the pound should be levied on the whole ratable property in the county liable to assessment according to any law in force. The 2nd clause provided for the method of taking assessment, (not objected to.)

Other objects were provided for in succeeding clauses.

4. A by-law of the Municipal Council of the County of Waterloo, passed on the 4th of June, 1851, intituled "by-law to impose a tax on the ratable property of the County of Waterloo, to meet the current expenses of the county for the year ending on the 31st of December, 1851."

This enacted (under authority of 12 Vic. ch. 81) that the following sums should be levied and collected in the under-mentioned townships and incorporated villages, viz :—

In the township of Arthur 34*l.*

In the township of Bentinck 22*l.*

In the incorporated town of Guelph 153*l.*

and so on enumerating twenty-four different localities, and assigning to each a certain sum, ranging from 6*l.* for the township of Melancthon to 521*l.* for the township of

Waterloo: and that these sums respectively should be levied and collected in the different municipalities, in accordance with the act 13 & 14 Vic. ch. 67.

Wilson, Q. C., shewed cause.

ROBINSON C. J., delivered the judgment of the Court.

The by-law of the 12th of August, 1842, is repugnant to the statute 4 & 5 Vic. ch. 10, under the authority of which it was passed, for it specifies no sum to be raised *by a rate*, but begins by imposing a rate on all lands in addition to the existing rate; not for the purpose of making up any sum appropriated to any purpose, nor limited to any time; and it selects wild lands alone as the object of taxation, whereas, when any tax could be imposed under that statute upon lands specifically, it was required to be imposed *on all lands within the district*. We are of opinion that the rule for quashing this by law must be made absolute.

The by-law passed on the 9th of October, 1849, is, in my opinion, clearly illegal and void, as being repugnant to the statute 4 & 5 Vic., ch. 10, in not limiting a sum in the by-law to be raised and then fixing a rate for paying it, but in simply imposing a rate without specifying what amount it is intended to cover. It is bad also, I think for other reasons stated by the applicant. The 48th section of 4 & 5 Vic., ch. 10, authorized no such legislation. It only allowed the councils first to direct some public work to be performed at the expense of a township, next to estimate its cost and direct the amount to be raised, then to impose a rate for raising it. This by-law authorizes a rate per pound without limiting any sum to be raised, and groups the townships together in such a manner as to shew clearly that they could not have been passing the by-law for any such specific purpose, arising within any one township, as was contemplated in the 48th clause, but for the creation of a revenue to be applied to purposes which are not specified as having been authorized by the district council, but which would seem rather to have been authorized in some other manner, by the singular provision, not consistent with the law, which places the money at the disposal of the individual councillors serving for the respective townships,

We are of opinion that the rule must be made absolute for quashing this by-law.

As to the by-law of the 31st of January, 1850, we are of opinion that it is void, when examined in connection with the statute 12 Vic., ch. 81, under which it was passed, as it most undoubtedly would have been under the former act; for in its enacting part it gives no information whatever of the purpose for which the money is required, nor of the sum required, nor does it make any application of the money to be raised. It is not a sufficient remedy for all these capital defects, that in the title to the by-law it is stated that the tax is to be imposed for meeting the current expenses of the year 1850. It merely imposes a tax, and then leaves the matter. It appears to me that it is still necessary (though the present act does not in express terms require it, as the 4 & 5 Vic. did) that a certain sum to be raised should be specified in the by-law, and then the rate authorized for raising it; but it is not necessary to determine that, for this by-law is otherwise bad. I am inclined, however, to think that this is the sound construction of the 22nd head of the 41st clause of 12 Vic. ch. 81. The rule must be made absolute for quashing so much of the by-law as imposes the rate, and all that relates to it.

The last of the by-laws moved against is that of the 14th of June, 1851, which is clearly illegal; for by it the county council assumes to rate certain townships for certain sums without specifying in the body of the by-law for what purpose the money is required, or authorizing its appropriation to any purpose. Such a mode of taxing is clearly unauthorized by law. For any general purpose of the county all the ratable property in the county must be assessed ratably, whether in one township or another. If the council had a discretion to tax in this manner, they might make one township contribute 5*l.*, and another 500*l.*, to the same county objects, even where there was no inequality in the population and wealth of townships. It imposes no rate per pound, nor directs an equal rate to be assessed.

The rule must be made absolute for quashing this by-law.

By-laws quashed.

DOE DEM. McQUEEN v. McQUEEN ET AL.

New trial refused—Conflicting evidence.

The court are not bound to grant a new trial, when there was no misdirection, nor any point of law involved, and where it does not appear that the justice of the case requires it, though the verdict may seem to be against the weight of evidence; and, under the peculiar circumstances of this case, they refused to interfere.

Ejectment for 100 acres of land in the township of Woodhouse.

In 1850, one of the present defendants (James McQueen) brought an action of ejectment against his father (the now plaintiff) to recover the same premises; and upon evidence which was very conflicting, as it was in the present case, the jury gave him a verdict which enabled him to dispossess his father, who was sworn by several witnesses upon this trial to have been in possession without interruption since before the year 1816.

The now defendant (James McQueen) founded his claim in the former action upon a conveyance made by his father to him in September, 1816, which there was no reason to doubt was a mere colourable conveyance, made for some purpose understood between them, but which, nevertheless, so far as they only were concerned, could not be disputed, on any such ground; and it was not pretended, either in that suit or in this, that any imposition was practised by James McQueen upon his father in obtaining that deed from him. But the father (Daniel McQueen, in defending that action, claimed to hold, notwithstanding his having made that conveyance, on the ground that he had held possession without interruption for more than twenty years, in fact ever since he made that deed, as well as for some years before, receiving the rents and profits to his own use. On the other hand, his son (James McQueen), when plaintiff in that action, brought evidence to establish, that although his father had been in possession as he alleged, yet it was not as owner; and that he did not take the profits, but another son of his, to whom James McQueen had leased it with his father's knowledge and sanction. The jury gave their verdict for the plaintiff in that action; and, though

there was a great deal of contradiction in the evidence, and on the affidavits which were afterwards filed upon an application which was made for a new trial, yet the court did not feel that they were called upon to set aside the verdict, because there was evidence enough to support it, and it was quite impossible for the court or the jury to say what the honesty of the case really was. Not being able to pronounce that the verdict was wrong upon the evidence then before them, the court declined to interfere.

The father, in consequence, became the plaintiff in his turn in this suit, and the title thus came a second time before a jury upon evidence most unsatisfactory and inconclusive as regards the real merits and true nature of the transaction. The jury, on this latter occasion, gave a verdict for the plaintiff, which, if allowed to go into effect, would have restored the defendant's father to a possession which he had held for nearly forty years, and of which the last verdict deprived him.

The fact in dispute was, whether Daniel McQueen (the father), who was openly and visibly in possession from 1816 downwards, and, as was supposed by his neighbours, as owner, cultivating it on his own account, was really occupying the place on that footing; or whether, during a considerable part of the period at least, a son of his (Daniel McQueen), who lived with him, was or was not, as this defendant maintained, the person really enjoying the place as tenant under a lease from this defendant, made long after the father had made the deed to James in September, 1816.

Galt, for the defendant, moved for a new trial on the law and evidence.

Freeman shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

If the jury, on the evidence that was given on the last trial, had found in favor of the son, as the jury on the first trial of this title did, I think we should probably not have felt ourselves bound to set it aside, for the evidence would have warranted it if the jury had given credit to what the witnesses of the defendant stated, and had disbelieved the

other testimony. But we have to consider whether the verdict now rendered for the father is so clearly against law or evidence that it ought not to be suffered to stand.

It is not complained that the learned judge who tried the cause did not give the case to the jury as favorably for the defendant as he could properly do. If the jury wholly discredited the testimony of Daniel McQueen (brother of the defendant), upon whose evidence his case chiefly rested, we cannot say they did wrong, after considering what was judicially before us in this same term in another suit brought by this defendant and one of his brothers against another brother. And, looking at the whole complexion of the case, the extraordinary nature of the documentary evidence, and the contradictory statements of the witnesses, I am altogether opposed to any interference with the verdict. There is no legal question involved; it was a case for the jury to deal with on the evidence. There is fraud apparent on the face of the strange deed made by the plaintiff to the defendant in September, 1816, when we look at its language, and consider that so long ago as 1800 the title had actually been conveyed to Daniel McQueen by Alexander McQueen (his brother), whom Daniel McQueen, nevertheless, it would appear by this deed, seems to have wished to have it in his power to treat as being still the owner of the property. It seems that, though for some purpose of safety at the time, he wished to enable James McQueen to stand forward as the owner of the property rather than himself, yet that he was not quite sure that the property might be safe from attacks in the hands of either of them, and therefore resolved that the deed he was giving to James, in September, 1816, should contain nothing inconsistent with his afterwards setting it up as a fact that his brother Alexander was the true owner, if it should become expedient for him to do so.

Nothing can be clearer than that a person acting in the spirit in which the present plaintiff seems to have done, when he made that deed in 1816 to the defendant, stands in no favorable light before a court of justice, and it was for that very reason that this court refused to interfere in

his favor by granting him a new trial, when there was no legal question involved, and when the jury in the first action had, upon conflicting evidence, decided against him. They left him to take his chance of the verdict, and felt no disposition to protect him against the consequences of his own fraud. On the other hand, though his son, the now defendant, is allowed to insist on his right to hold under the deed of 1816, and to treat it as a real *bonâ fide* transaction, and thus to violate any secret confidence that may have been reposed in him by his father, to the prejudice of others; yet neither does he, any more than his father, stand in such a light before the court, as that any disposition can reasonably be felt to interfere for his protection, and to insist that he shall have the benefit of this very suspicious deed, and shall be assisted by the equitable interposition of this court in maintaining possession under it, when a jury have pronounced against him upon the ground that he has allowed himself to be for more than twenty years dispossessed of any title that could have come to him under that deed. Can we say that upon the point of possession the defendant was clearly entitled to succeed, and that the finding of the jury was altogether unsupported by evidence? If we could say that, we should perhaps feel it necessary to interpose; but the fact is otherwise; the evidence for the plaintiff on this last trial is strong to shew that the plaintiff has, through the whole period, been occupying for his own benefit, by himself or his tenants, without paying rent to the defendant, and without giving any written acknowledgment of his title. There was nothing in proof, on this trial, that comes up to what the Statute of Limitations requires on this latter point for taking a case out of the statute.

As we cannot feel the slightest assurance what the honest truth of the case is, we should not run the risk of doing positive injustice by relieving this defendant against the verdict which the jury has given.

Rule discharged.

EASTER TERM, 15 VIC.

Present—THE HON. JOHN BEVERLEY ROBINSON, C. J.

“ THE HON. WILLIAM HENRY DRAPER, J.

“ THE HON. ROBERT EASTON BURNS, J.

DOE DEM. DICKSON ET UX. V. GROSS.

Will and codicil, construction of—Power of the crown to sell lands of a public accountant, under 13 Eliz., ch. 4.

C, died, leaving a will, which, after disposing of certain real property, proceeded as follows: “all the rest and residue of my real as well as personal estate, which I may die seized or possessed of, *in reversion, remainder or contingency*, I will, devise, and bequeath unto my beloved wife Catharine, in trust, to sell or dispose of any part or parcel thereof for the payment of my just debts, and to use and enjoy in such a manner as in her prudence and discretion will be most conducive to her own comfort and that of her children and grandchildren, during the term of her natural life,” &c. Afterwards the testator added a codicil, referring to certain land obtained by him since the execution of the will, and bequeathing the same as follows: “I do now therefore, by this codicil, to this my last will annexed, give and devise the said parcel or tract of land, as it is in the same deed and surrender more particularly described, to the same persons, my beloved wife and children, *to whom I have devised all the rest and residue of my real estate* in my will hereunto annexed,” &c., adding the usual words of publication.

The testator, at and before his death, was Deputy Superintendent General of Indian Affairs, and trustee of the Six Nations Indians, and as such superintendent was an accountant to the crown, and at the time of his death he was indebted as trustee.

Held, first—That the testator was not a public accountant within the meaning of the 13 Eliz. ch. 4; and that the crown could have no authority to sell his land under that statute.

Secondly—That the codicil referring expressly to the will must be looked upon as forming part of it; and that, taking the two together, the will might be construed to include all the testator's lands of which he should die seized or possessed, and not only those in reversion, remainder, or contingency.

Ejectment for the south half of 21 in the 4th concession of the township of Innisfil.

The land sued for was the property of the late Colonel Claus in his lifetime, having been granted to him in fee simple by the crown in 1822. He died on the 11th of November, 1826, having made a will on the 13th of July, 1826, by which, after devising to each of his four grandchildren (being children of his daughter, Mrs. Geale) a town lot in Niagara, and to each of their respective heirs and assigns forever—he devised all the rest of his worldly estates, subject to the payment of his debts, in manner fol-

lowing, that is to say—to his son John Johnson Claus, his heirs and assigns, certain lands in Saltfleet ; to his wife a certain real estate in Lower Canada, to hold during her natural life ; and then the will proceeded thus,—“ all the rest and residue of my real as well as personal estate which I may die seized or possessed of, in reversion, remainder, or contingency, I will, devise, and bequeath unto my beloved wife Catharine, in trust, to sell or dispose of any part or parcel thereof, for the payment of my just debts, and to use and enjoy in such a manner as in her prudence and discretion will be most conducive to her own comfort, and that of her children and grandchildren during the term of her natural life ; and at her decease, I will, devise, and bequeath all or any such real or personal property as may remain undisposed of, as well as the aforesaid fief or farm in Lower Canada, respectively to each of my sons John Johnson and Warren, and to each of my daughters, Catharine A. M. Geale and Julia Caroline Claus, and their respective heirs and assigns, to be equally divided amongst them, to hold the same as tenants in common.”

“In the event of my wife surviving my said daughter Catharine, or if my son Warren, or John, or either of them, should die before their mother, being unmarried and without issue, then I will and devise such proportion of my real and personal estate as all or either of my said children would have been entitled to under this my will, to my grandchildren, the son and three daughters before mentioned of my said daughter Catharine Geale, or such as may be living at the decease of my beloved wife, to hold the same to them and their respective heirs and assigns, as tenants in common.” He then appointed his wife executrix, and his two sons executors, of his will.

Afterwards, on the 9th September, 1826, the testator added a codicil, in which he recited that the Six Nations of Indians had, on the 3rd August, 1826, surrendered a certain tract of land to his Majesty, with the intent that it should be granted by his Majesty to him (the testator), his heirs and assigns ; and then he added, “I do now, therefore, by this codicil, to this my last will annexed, give

and devise the said parcel or tract of land, as it is in the same deed and surrender more particularly described, to the same persons, my beloved wife and children, *to whom I have devised all the real and residue of my real estate* in my will hereunto annexed; for the same uses and purposes and limitations, to them, their heirs and assigns, as therein mentioned, as tenants in common." And he added the usual words, that this is published and declared as a codicil to his last will and testament, and to be taken as part thereof, in the province of, &c.

At the trial, before Robinson, C. J., it was admitted that the testator, Colonel Claus, died on the 11th of November, 1826; that his daughter, Julia Caroline Claus, died on the 11th of February, 1827, without issue and unmarried; that Augusta Maria Geale, the daughter of Catharine A. M. Geale, married Walter H. Dickson, one of the lessors of the plaintiff, in 1831 or 1832; that Catharine A. M. Geale had one son and three daughters—viz: John B. Geale; the above-named Augusta Maria Dickson; another daughter, the wife of William Stewart, all of whom were living at the time of the trial; and Julia Geal, who died in the year 1836; and that possession of the premises was duly demanded of the defendant by the plaintiffs before this action brought.

The execution of the following deeds was also admitted :

1st. A deed made on the 6th of December, 1847, whereby Warren Claus, son of the testator, in consideration of 300*l.* paid to him by W. H. Dickson, one of the lessors of the plaintiff, released to him, his heirs and assigns, all his title and interest to the lands in question in this suit, and to certain other lands devised to him by his father, Colonel Claus.

2ndly. A deed made on the 30th of November, 1850, whereby Warren Claus, the same son of the testator, in consideration of 62*l.* 10*s.*, paid to him by Walter H. Dickson, Esquire, lessor of the plaintiff, granted, bargained, and sold to him in fee all his right, interest, and claim to the lands in the township of Innisfil in question in this suit.

3rdly. A deed made on the 7th of May, 1851, whereby

Catharine A. M. Lyons, widow (formerly Geale, a daughter of the testator), and her son John B. Geale, in consideration of 600*l.* paid to them by Walter H. Dickson, Esquire, and his wife Augusta Maria Dickson, the two lessors of the plaintiff, granted to them the lands in Innisfil, being the premises in question, to hold in fee simple.

4thly. A deed made on the 5th of May, 1851, whereby William Stewart, and Catharine C. Stewart his wife, in consideration of 600*l.*, granted to the said Walter H. Dickson and his wife, in fee simple, the lands in Innisfil, in question.

Mrs. Claus, the widow of the testator, died in 1840.

The plaintiffs, on their part, admitted, that at and before the time of his death in 1826, the testator, Colonel Claus, held the office of Deputy Superintendent-General of Indian Affairs, and was also trustee of the Six Nations of Indians; and as such superintendent became and was an accountant to the crown, and was at the time of his death indebted as trustee. And it was admitted also, that on the 6th of June, 1831, John Johnson Claus, as eldest surviving son and heir of the testator Colonel Claus, by deed produced on the trial, in consideration of 5*s.*, granted, bargained, and sold to James Baby, John Henry Dunn, George H. Markland, Esquires, and to their executors, administrators, and assigns, these lands in Innisfil, to hold to them, their executors, administrators and assigns, with the usual covenants; and the grantees declared in this deed that these lands were conveyed to them in trust for the use of the Six Nations Indians settled upon the Grand River, and their posterity, forever; and that all moneys arising from the absolute sale of the lands, and from the rents or profits thereof, should be held by the grantees for the sole use and benefit of the said Six Nations of Indians and their posterity; and on the 3rd of June, 1844, by indenture between J. H. Dunn and George H. Markland, Esquires, and her Majesty the Queen, reciting the last mentioned deed, and that J. Baby had since died—they, as surviving joint tenants, in consideration of 5*s.*, surrendered, released, and conveyed to her Majesty, her heirs and successors, all the estate held by them in these

lands in Innisfil in trust, for the sole use and benefit of the Six Nations of Indians settled on the Grand River, and their posterity.

It was proved that the defendant in this action was returned by the township assessor as being in possession of the land mentioned in this action in 1848—another person having been returned as in possession in 1847, but no one before that. No other evidence was given of any one having been at any time in actual possession, as claiming the fee or otherwise.

It was admitted that when the declaration in this action was served, on the 28th of May, 1851, the defendant was in possession, claiming under a title from the crown.

The defendant's counsel contended that no interest in this land, or in any of the lands in Innisfil passed under Colonel Claus's will, which only devised "such real estate as he should die seized or possessed of *in reversion, remainder, or contingency* ; and that his estate in these lands in Innisfil answered neither of these descriptions : 2—that the testator being an accountant to the crown, as superintendent or trustee for the Indians, the crown could seize and sell his lands under 13 Eliz. ch. 4, without inquest of office or any previous proceeding : that the testator, being indebted to the crown, could not devise these lands ; and that the devise was made subject to the testator's debts : 3—that the conveyance made to the lessor of the plaintiff by the children of the testator could not operate, because this defendant was in possession claiming the fee ; and that the deed of Warren Claus, being a mere release or quit claim, could pass nothing to the lessor of the plaintiff, W. H. Dickson, for want of any previous estate in him on which to operate, and because he was not even in possession.

It appeared to the learned Chief Justice that, as to these latter objections, they could not affect the plaintiff's right to recover in respect of such interest as Mrs. Dickson would have, as one of the children of Mrs. Geale, in the share of Julia Claus, who died without issue during the life of her mother ; but both parties desired to have such legal points as the case presented reserved for the consideration of the court.

A verdict was given for the plaintiff, with leave reserved to move for a nonsuit on the objections raised.

Wilson, Q. C., with whom was *Turner*, for the defendant, moved for a nonsuit on the leave reserved, or for a new trial on the law and evidence. They cited *Doe Ford et al. v. Bell et al.*, 6 U. C. R. 527; *Strong v. Teatt*, 1 W. Bl. 200; 2 Burr. 911, S. C.; *Doe Leach v. Micklem*, 6 East. 486; *Right dem. Day v. Day*, 16 East. 67; *Hill v. Chapman*, 1 Ves. Jr. 407; *Crosbie v. McDoual*, 4 Ves. Junr. 610; *Chester v. Chester*, 3 P. W. 56; *Morgan dem. Surman v. Surman*, 1 Taunt. 288; *Atkyns v. Atkyns*, 2 Cowp. 808; *Doe Nowell v. Roake*, 5 B. & C. 720; 6 Bing. 475, S. C.; *Mosley v. Mosley*, 8 East. 149; *Doe dem. Parkin et al. v. Parkin*, 5 Taunt. 321; *Doe Phillips v. Phillips*, 1 T. R. 105; *Doe Biddulph v. Meakin*, 1 East. 456; *Law Magazine*, vol. 42, 108; the *Mayor of Gloucester v. Wood*, 3 Hare 131; *Smart v. Clarke*, 3 Russ. 365; *Low v. Carter*, 1 Beaven 426; *Winterton v. Crawford*, 1 Russ. & M. 407; *Bengough v. Edridge*, 1 Sim. 173; *Sherratt v. Bentley*, 2 Myl. & Keen. 149; *Myles v. Dyer*, 8 Sim. 330; *Read v. Backhouse*, 2 Russ. & M. 546; *Doe dem. Snape v. Nevill*, 12 Jur. 181; *Lovell v. Knight*, 3 Sim. 275; *Adams v. Adams*, 6 Jur. 681.

Vankoughnet, Q. C., contra, cited *Doe Gallini v. Gallini*, 3 A. & E. 340; *Kerry v. Derrick*, Cro. Jac. 104.

ROBINSON, C. J., delivered the judgment of the Court.

We are all clear that the statute 13 Eliz. ch. 4, which makes the lands of public accountants liable to be sold (and not merely extended) in satisfaction of their debt to the Queen or her successors, did not authorize the government of this province to sell any portion of Colonel Claus's lands to the defendant, if that were done; and that the defendant is in no position to maintain possession under anything that was proved or admitted to have been done under that statute. The 1st, 2nd, 3rd, and 10th clauses are such as shew that the statute was not intended to apply, and does not apply, to any such case as this appears to be on the evidence; and if it did apply, we have no evidence of any debt found of record, or in fact of anything attempted

to be done under the statute. Colonel Claus was not shewn to be such an accountant as comes within the act; nor was anything shewn to have been found by office against him, nor any proceeding taken against his heir, such as would be necessary under 27 Eliz. ch. 3, before the land could be sold; and as to any lien the crown may be able to establish, no ground of lien has been shewn; and if there be a lien, it would not prevent the land being devised.

The only question—as indeed seemed to be almost conceded upon the argument—is, whether the lands in Innisfil passed under the will of Colonel Claus, inasmuch as the testator was not “seized or possessed of those lands either in reversion, remainder, or contingency;” for if not, then the title of the heir-at-law would be sustained.

The question raised in this will shews what inconvenience is sometimes occasioned by extreme and unnecessary caution. No one can doubt for a moment what this testator meant; and if the person who drew the will had known nothing of reversions, remainders, or contingencies, he would have drawn such a will as the testator wished, and would have left no room for question. We cannot, I think, allow the admission of the execution of the will to have so restrictive an effect as to except the codicil; for that refers to the will and is, as it were, incorporated with it, so as to form one instrument. If the defendant's attorney meant to put the party to proof of the codicil as a thing separate from the will, and not intended to be admitted, he should have seen that that was distinctly understood; and there would be nothing gained by excluding it from view; for we should not determine the case till an opportunity had been given to prove it on another trial, if it seemed material to the construction of the will.

In my opinion the land in question did pass by the will. That the testator did not mean to die intestate as to his estates in possession, which, for all that appears, were all that he owned, no one considering the will can doubt for a moment. What he meant to say is, “all the residue of my estates which I may die seized or possessed of, (*including*

those in reversion," &c.) Or, "all the residue of my estates which I may die seized or possessed of, or which I may hold in reversion," &c. The construction contended for would certainly exclude that which he had most in contemplation, and probably all that he could actually have had in contemplation, and take in only estates of such descriptions as it is not pretended he possessed. It is evident from the whole tenor of the will that he did not intend to die intestate as to any of his property; and did not intend to leave his widow, and children, and grandchildren, to depend upon his estates in reversion, remainder, or contingency alone, nor to charge such estates alone with payment of his debts; and what he says of his wife's *using* and *enjoying* the estates devised "in such a manner as in her prudence and discretion would be most conducive to her own comfort, and that of her children and grandchildren, during her natural life," all indicates a view to present enjoyment; and it is a circumstance that in his will he provides for his heir-at-law.

When the meaning is so evident, I think we shall be well warranted in reading the words "which I may die seized or possessed of," as intended to describe estates in possession, and supplying the word "*or*" before the words "in reversion," &c.; or indeed, without supplying or supposing any word, if we read the will as it stands, we may take "all the estates, real as well as personal, which I may die seized or possessed of" as one member of the sentence, meaning one description of estates; the words in "reversion," &c., as another member of the sentence, designating another description of estates, and so on,—which is a common mode of construing a sentence composed of several parts to be taken disjunctively, where the adverb is not usually repeated between each two members, but only before the last. That method of reading the sentence would suppose the word "estates" to be intended to override the whole, which I have no doubt is exactly what was meant; and it would, I think, be no forced construction.

The codicil, when it refers so expressly to the will as this does, we must look upon as a part of the will as much as

if it were written on the same paper; and it shews very clearly that the testator did mean to devise his estates in possession (not otherwise devised) to his wife for life, with remainder over, and not merely his estates in reversion, &c., and he assumed that he had done so. This serves to remove any doubt as to the intention of the will.

The heir-at-law may have a laudable desire to apply the lands now in question towards the satisfaction of any debt due to the Six Nations of Indians, or to the government, but we think these lands did not devolve upon him, but passed under the will to the residuary devisees, and that the rule must be discharged.

Rule discharged.

TYLEE V. THE MUNICIPAL COUNCIL OF THE COUNTY OF
WATERLOO.

By-laws passed under 4 & 5 Vic. ch. 10—Necessity for statement of the purpose for which the money required—Land need not be separately charged, or taxed by the acre.

A by-law, passed under 4 & 5 Vic. ch. 10, for raising a rate, stated that the money was required to pay off 1500*l.* due to the Gore Bank, and 500*l.* due by the District to A. D. *Held* sufficient, and that it was not necessary to state for what services the money was due, for the court would intend that the debts were legally contracted and for a legal purpose.

Under the above statute, land must have been taxed at so much in the pound on its assessed value; and it was not necessary that a by-law should charge upon land separately a distinct proportion of the sum authorized to be levied.

In this case, *Cameron*, Q. C., moved to quash several by-laws last term; and the application was disposed of so far as regarded four of the by-laws, two being reserved for further consideration (*a*).

The first of these was a by-law passed by the District Council of the district of Wellington, under the statute 4 & 5 Vic. ch. 10. It was passed on the 12th of August, 1846, and was entitled, "A by-law to assess the district of Wellington one half-penny in the pound, to pay off two debentures held by William Allan, for erecting the court house in said district."

It recited that these debentures were due, and that it was

(*a*) Ante page 572.

necessary they should be paid off; and it enacted, "that the district of Wellington be assessed one half-penny in the pound, to be appropriated towards the liquidating these debentures; the one being for 850*l.*, and the other for 242*l.* 1*s.* 3*d.*;" and "that the rate of an half-penny in the pound shall be assessed on all ratable property in the district, in the same manner as other rates are levied and collected."

It was objected to this by-law, first, that the particulars of the debt for which the debentures were issued should have been stated, in order that it might be seen for what public charges or services the debt was contracted; secondly, that it should have been appointed in the law what portion of the money should be charged on the lands in the county, and that a certain rate per acre should have been imposed on the lands, in order to make up such proportion.

The other by-law was passed, also by the District Council, on the 9th of October, 1849, under the former statute 4 & 5 Vic. ch. 10. It was entitled, "By-law to assess the several townships in the Wellington district the sum of one penny in the pound on all ratable property in the said district, for the purpose of liquidating the sum of 1500*l.* due to the Gore Bank, and 500*l.* due by the district to Alexander Drysdale, Esquire;" and it enacted that "one penny in the pound shall be raised on all ratable property in the district, for the purposes aforesaid, to be levied as other rates."

The objections urged against this by-law were, that it did not state for what services the debts were incurred for which the debentures were given, nor even state that they were for sums due by the district; and that the lands should have been charged with a certain part of the sum to be levied, and should have been rated in a sum per acre to pay such amount, and not made indiscriminately subject with other property to a rate in the pound.

Wilson, Q. C., for the defendants.

ROBINSON, C. J., delivered the judgment of the court.

In regard to the by-law of the 12th of August, 1846, the nature of the service for which the debentures were

intended to provide as stated—namely, to meet the charge for erecting the court house: that objection therefore fails. And as to the similar objection taken to the by-law of the 9th of October, 1849, the by-law is so far specific that it states the debts and their respective amounts, so that they can without difficulty be traced. It is true that it does not shew for what public service the debts were incurred. It would be more regular and satisfactory to make that appear on the face of the by-law; but we are of opinion that we cannot properly hold the by-law to be illegal because it does not give that information: we should support it by every reasonable intendment. One of the debentures is stated to be for a debt due by the district to the person named; and though the other debenture is stated to be for 1,500*l.* due to the Gore Bank, without expressly adding by whom it was due, yet we must intend it to be by the district which gave the debenture when nothing to the contrary appears; and this by-law, we think, sufficiently complies with the requisites of the statute, for it states the amount to be raised, and shews that it is to pay debts due by the district on debentures. We will intend that the debts were legally contracted, and for a legal purpose; for it is a clear principle of law that a by-law need not shew on the face of it all the facts that are necessary to prove it to be valid. We are not to scrutinize them as if they were special pleas. When we can see on the face of them that they are illegal, as being repugnant to the statute or otherwise contrary to law, we must notice the objection and give effect to it; but it is not indispensable that everything should appear on the face of them which is necessary to make them legal. Then, as to the remaining objection, which is common to both those by-laws: I do not consider that a by-law passed under the authority of the statute 4 & 5 Vic. ch. 10, must necessarily charge upon land separately a distinct proportion of the sum which it authorizes to be levied. That is not required by the 41st clause of that statute, but is only permitted, if the council shall think it desirable in any case to do so. There is nothing mandatory on the council to tax

lands in a greater or less degree than other ratable property; they may if they please allow, as they have done in this case, all descriptions of ratable property to contribute in equal proportion, according to its assessed value. And I also think that there was nothing in the statute 4 & 5 Vic. ch. 10, or in any other statute, which prevented lands from being rated as they had before been, and as all other property was rated when this by-law was passed—that is, according to a certain sum in the pound on the assessed value. There is nothing to make this illegal, and to require that land when rated either separately or with other property, shall be rated by the acre and not by the pound. The Council were only required to take care that all the rates which they charged upon it during the year should never exceed in the whole a penny half-penny per acre.

It was urged on the argument that it must follow as a consequence of the 41st clause of the act, that land must thenceforward be rated by the acre, and not by the pound, for that otherwise the effect of the rating would operate unequally and absurdly, on account of the different valuations placed by the then existing law on cultivated and uncultivated land. If the passing of the 41st clause had made a modification of that kind necessary in the manner of rating, it was for the legislature to alter the law. We could hardly take that liberty in a matter of so delicate a nature as taxation. But I do not see the ground for assuming the former method of rating to be wholly irreconcilable with everything contained in the statute 4 & 5 Vic. There is nothing impracticable in the case. Whether the objection would be reasonable or not, is not for us to consider. If the legislature had charged in this by-law 500*l.* of the sum upon the land, as they might have done, they must, I think, have imposed a rate in the pound for producing it—for instance, a penny in the pound; and in that case the effect would have been to tax the cleared land a penny per acre, and the uncleared one-fifth of a penny. If, when all the charges upon lands for the year came to be added up, it were found that cleared lands had been already

rated to such an extent as to amount to one penny half-penny per acre, then the power to impose further taxes on cleared lands would cease, while the uncleared lands might still be taxed for further amounts, until they had been made to contribute as much as the cleared lands—that is, one penny half-penny per acre. But I cannot say that the legislature did not mean that; they might possibly mean that the man who had been at the expense of clearing his land, which is a public benefit, should not on that account be taxed more on it by the acre than others might be made to pay in respect to their wild land, on which they had expended nothing. Up to the one penny half-penny per acre, they might be made to contribute in the proportions fixed by law; but each would be liable to pay taxes in all that would amount to one penny half-penny per acre, and nothing more (a).

We see no sufficient ground for quashing either of these two by-laws, and therefore discharge the rules with costs.

This last question cannot be raised in regard to any by-laws passed since the new Assessment Act came into force, nor indeed since the repeal of the 4th & 5th Vic. ch. 10.

Rule discharged.

HARDEN V. PROCTOR.

Common carriers by water—Exception against “dangers of navigation.”

Where an exception against loss by dangers of navigation is contained in a bill of lading, and the vessel is in fact lost in a storm, the evidence of negligence or improper conduct must be very clear in order to make the ship owner liable; and although it lies upon the defendant in the first place to bring himself within the exception, yet this is sufficiently done by shewing a shipwreck from stress of weather; and the plaintiff is then called upon to establish that the loss would not have happened but from negligence or want of skill.

The plaintiff declared in case against the defendant as a common carrier by water, from Oswego, in the State of New York, to Newcastle, in Upper Canada.

In his first count he charged that, on the 6th of December, 1850, he delivered certain goods to the defendant to be

(a) See *Doe McGill v. Langton*, ante p. 91.

carried from Oswego to Newcastle, *to be delivered by the defendant within a reasonable time*, for a certain reward, &c. &c. : that the defendant, neglecting his duty, did not safely and securely carry the goods, but so negligently conducted himself that the goods were wholly lost to the plaintiff.

In the second count, the plaintiff charged that the defendant received the goods to be carried and delivered within a reasonable time, the dangers of the navigation only excepted; and he averred that no danger of the sea prevented the safe carriage or delivery of the goods, but that the defendant so carelessly, negligently, and improperly conducted himself, that, for want of due care in the defendant and his servants, they became wholly lost to the plaintiff.

In a third count it was declared that the plaintiff, on the 6th of December, 1850, being at Oswego, and being desirous of having the said goods delivered for him at the port of Newcastle, in Upper Canada, applied to the captain of the defendant's vessel, "the Malta," which was then at Oswego for the purpose of procuring a cargo, to carry the plaintiff's goods from thence to Newcastle; that the plaintiff, having heard that it was the intention of the captain to take on board a large quantity of plaster-stone to be carried to Newcastle, was unwilling to deliver the goods to be carried if the plaster-stone was to form part of the cargo, and would not have consented to it; that he therefore inquired of the captain whether he intended to make such plaster-stone a part of the cargo, and that the captain, "then, fraudulently intending to deceive him, falsely and fraudulently represented to the plaintiff that the stone should not form a part of the cargo in the said voyage;" that the plaintiff was induced by such fraudulent representation to permit his goods to be carried in the said vessel, and contracted with the captain to carry and convey the same; that the captain, nevertheless, without the knowledge of the plaintiff, and contrary to his own representations, took on board 80 tons of the said stone; and that soon after the vessel sailed, by reason of the large quantity of stone being on board, she sprang a leak; and in order

to save the vessel and the crew, the captain ran her on shore near the mouth of the Genesee river, in the state of New York; by reason whereof the plaintiff's goods became damaged and spoiled, and were wholly lost.

A count in trover was added.

The defendant pleaded—1st. Denying the delivery of the goods to him in the first count mentioned, for the purpose and in the manner and form, &c.

2ndly. To the third count—that it was not represented to the plaintiff by the captain of the vessel that the stone should not, or would not form a part of the cargo, as in that count alleged.

3rdly. To the whole declaration—not guilty.

Verdict for the defendant.

Vankoughnet, Q. C., obtained a rule nisi for a new trial on the law and evidence, and for misdirection. He cited *Lyons et al. v. Mells*, 5 East. 428; *Dale v. Hall*, 1 Wils. 281; *Pickford et al. v. the Grand Junction Railway Company*, 12 M. & W. 766; *Carpue v. the London and Brighton Railway Company*, 5 Q. B. 747.

Hector shewed cause, and cited *Coggs v. Barnard*, Ld. Raym. 900; 1 Smith's Lea. Ca. 82, S. C.; *Amies v. Stevens*, 1 Str. 128; *Muddle v. Stride et al.*, 9 C. & P. 380.

The facts of the case are fully stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

At the trial the plaintiff endeavoured to prove that he had made it an express stipulation with the captain that he would not take the plaster-stone on board, and that the captain violated this understanding with him. The witness, on whose testimony he relied, stated that he and the plaintiff went to the vessel while she was lying at the dock in Oswego, and inquired of the captain what he was intending to take over to Newcastle on that trip, to which the captain answered that he had intended to take some plaster-stone, but had made up his mind not to take it. This witness had 150 barrels of salt which he wished to send, and the captain said he would take it; and the plaintiff told him that he had some merchandize and furniture

to send which he would also have put on board. The captain agreed to take these also, explaining to them that his reason for not taking the stone was, that there were charges upon it at Oswego which they required him to pay before taking it on board, and that he declined doing so. All that the plaintiff desired to send, did not exceed about three tons. Two or three days elapsed while the captain was discharging a cargo he had taken to Oswego. In this interval the plaintiff had gone home, leaving it with the person who had accompanied him to the vessel, and was by occupation a forwarder at Oswego, to ship his goods when the time came. In the interval the person in whose charge the stone-plaster was, had received a letter insisting on his sending it over; and, the difficulty about the charges being overcome, when the forwarder went to see about shipping his salt and the plaintiff's goods, he was told by the captain that the agent having paid the charges on the plaster he must now take it over, and could not therefore carry his 150 barrels of salt; but that he had kept room for the plaintiff's goods, and would take them on board as soon as he had shipped the plaster. The witness swore that the plaintiff's goods were warehoused with him, and that he shipped them in the usual course of his business—considering that the plaintiff had himself contracted with the captain, and that he had no discretion to withhold the goods. He swore that the mate remarked that there were 15 tons too much cargo on board, but the captain said there was no danger. The vessel was so laden, this witness said, that if it had depended on him he would not have shipped his goods by her.

The captain swore positively that no stipulation was required of him not to take plaster, nor any condition of the kind made with him; but they merely came to him and enquired whether he had a load engaged, and that he explained to them how matters stood with respect to this plaster, which, on account of their expecting him to pay the charge upon it, he had declined taking, and would therefore have room for the salt spoken of, and for 150 barrels more, which another person had asked him to take, and also for

the plaintiff's goods. He declared that he merely stated how he was situated in regard to cargo in answer to their question. When the charges which had occasioned the difficulty were paid, he felt himself obliged to take the stone, and went to the forwarder, the plaintiff's witness, and told him so, and that in consequence he should not be able to take his salt, but would take the plaintiff's goods. He swore that the forwarder made no objection whatever, and that the plaintiff had expressed great anxiety to get the goods taken over. He admitted that the plaintiff had asked him whether he thought he could get the furniture over without damage, (there were some tables and several articles of cabinet-ware), and he told him he thought he could, supposing that he meant without being scratched or injured in that way.

The bill of lading was in the usual form given in these cases, *i.e.*, "shipped on board," &c., "the following goods, in good order, to be delivered in like good order, *dangers of navigation excepted.*"

The Malta, it appeared, was a schooner registered of 47 tons measurement, but carrying, as is usual, much more burthen than her registered tonnage. On the last trip previous she had taken 89 tons of stone-plaster across the lake, and the captain swore that she could have taken five tons more. On this occasion they took on board 75 tons of plaster; the plaintiff's goods about three tons, and about two tons of other things for another person.

As it was late in the season they waited for some days for a favourable time, when a few hours only would be required for the trip. They sailed on the 16th, and, the wind coming ahead, they returned after being out two hours. Then on the next day they sailed again, about 2 P.M., with a light wind from E.S.E., which was perfectly fair; but the wind increased till about four o'clock, when it rained and blew a gale—the wind shifting to N. E., and afterwards to N. W., and a heavy sea got up, which occasioned the vessel to leak; and to ease her they put away more before the wind, and made for the south shore, thinking to make Genesee Harbour. They made land below

the harbour, but it was snowing so hard that they could not see the harbour distinctly, and the captain worked off shore, hoping to get up to Niagara. The sails and rigging froze stiff, and finding themselves embayed, and unable to weather a point of land to the westward of them, they found that they must go ashore, and ran on the most favourable part they could find. She filled and became a total wreck, and the plaintiff's goods were lost or destroyed.

Two of the sailors swore that she was too deeply laden, considering the lateness of the season: that she leaked badly, and took in water besides when the sea broke over her, having no hatch cloths: that she was only a foot or fifteen inches out of water. These witnesses also swore that the vessel was sufficiently manned: that they all worked at the pumps: that the vessel had leaked before, but not dangerously: that the weather was very boisterous—a heavy gale and snow storm: that the weather was fine when they left Oswego; and that if it had continued so, they would have got over without difficulty.

The captain swore that the vessel had been deeper laden that season than she was on this trip: that she had leaked in some degree all summer, but had been repaired: that during the gale she leaked badly, which induced them to change their course and put more before the wind: that she was a seaworthy, good vessel: that the storm caused her loss: that if it had been clear weather they could have entered Genesee harbour, but could not venture in in the snow storm, and endeavoured to keep out. The men were on duty all night, the captain himself steering.

I told the jury that the plaintiff could not recover upon the first count, because he had there declared as upon an ordinary contract of a common carrier, without any qualification, which would leave the carrier subject to all risks, except from the act of God or the king's enemies; whereas it was clear from the bill of lading that the perils of navigation were expressly excepted, against which the defendant on such a contract made by his agent did not engage to insure, but left the owners of cargo to insure for themselves, as the plaintiff, acting prudently, would have done

in this case: that this substantial variance in stating the contract, precluded a recovery on the first count: that, with regard to the third count, which charged the defendant with misleading the plaintiff by an undertaking not to carry plaster, and with fraudulently deceiving him in that respect, it was for the jury to say whether they found that proved, or whether they found nothing more than an answer given in good faith, and true at the time, to an inquiry made in an ordinary manner, and not with any intention expressed of exacting a stipulation such as stated; and I thought it was not probable that upon the evidence they would feel it safe to take what passed in any other light: that if the forwarder had withheld the plaintiff's goods, and the vessel had arrived safely, being perhaps the last opportunity that season, and if the plaintiff had sued him for not shipping the goods, there seemed hardly to be any ground for holding, upon the evidence, that the forwarder would have been justified because the captain had changed his mind and taken the plaster, which indeed was no more objectionable, perhaps, than salt, supposing the tonnage to be equal: that if the jury were not satisfied that the captain gave any promise not to carry plaster, then the case must turn on the second count, and the question would be, whether they were of opinion, on the evidence, that it was not the dangers of navigation that prevented the safe carriage of the goods (in which case the loss would come within the exception in the bill of lading, and the defendant would not be liable), but that the loss arose from the negligence of the defendant and his servants—that is, of the master and crew. I made such observations as the evidence seemed to call for in regard to the leakage of the vessel, and any evidence of her general seaworthiness, and next on the fact of her being improperly laden with reference to the time of year and description of cargo. I told them that where it was evident, as it appeared to be here, that the proximate cause of the loss was the perils of the navigation, the vessel being actually wrecked in a storm, it could only be upon very plain proof of negligence or improper conduct, in overloading or otherwise, that the loss could be thrown

upon the ship-owner, notwithstanding the exception in the bill of lading: that courts of justice discountenanced nice investigations of that kind, which were sometimes attempted to be gone into as between insurers and owners of cargo; because, if such a course were allowed, the insured would never know when he was safe: that gross and evident overloading, such as would make it unlikely that the vessel would cross the lake in safety under ordinary circumstances, ought alone to make the defendant liable; but, in considering the facts, due regard must be had to the lateness of the season: that setting out, as they did, with a fair wind, a few hours would bring them to their port: that they waited till they got a favourable time, and that the sudden shift of wind seemed to have caused their misfortune; but they must first consider whether the seventy-five tons of plaster and five tons of other goods were not an unreasonable and unfit cargo for such a craft at such a season, registered at forty-seven tons and loaded nearly to her utmost capacity: and with observations on the arguments for and against the defendant on this question—whether the loss should be ascribed to negligence, or the perils of the navigation—the case was left to the jury.

The plaintiff's counsel contended that it lay on the defendant to shew clearly that the loss arose from perils of the navigation, and so came within the exception; to which I acceded, but held that where a case of shipwreck from stress of weather was clearly shewn, as it was here, then it lay on the other side to establish that the loss would nevertheless not have happened but from negligence or want of skill; as in this case, that if the vessel had had less cargo she would have leaked less; that the captain could in that case have persevered in his efforts to gain a harbour on the north shore, and might not have been forced to put away before the wind.

The jury on this direction found their verdict for the defendant.

I have stated the facts minutely, because these cases present questions of much interest in a commercial country such as this is; and if what is decided in one case is to

form in any degree a precedent to be acted upon in others, it is essential that all the circumstances which could have influenced the decision should be known. My brothers have considered the case, and I understand them to be of opinion that the jury ought not to have been directed otherwise than they were. I think so also, after fully examining the evidence, and referring to the adjudged cases. There is no fault, I think, to be found with the verdict, rendered as it was upon a charge as favourable to the plaintiff as the evidence warranted.

I see no ground on which the same principles should not govern in this case as in actions against insurers, where the defence has been set up that the loss arose from the negligence or unskilfulness of the master and crew, and not from the perils of the sea, which were insured against, though the question is presented in a different form. Here the plaintiff's agent saw the goods laden, and did not remonstrate; and certainly the perils of the navigation, from violent adverse wind and the snow-storm, were the proximate causes of the loss. There is no doubt that the defendant was entitled to a verdict on the first and third counts. The case turned on the second count; and, though it may be that a verdict for the plaintiff on that count might have been supported, yet I think the verdict that was given is more consistent with the evidence. To find for the plaintiff in such a case, upon a rigid view of the point of alleged negligence, would encourage owners of cargo to save themselves the expense of insuring, and to attempt in case of loss to make out some case of negligence or unskilfulness, that might take the case out of the exception in the bill of lading of losses by perils of navigation, and throw the loss upon the ship-owners. This, as was remarked by the Court of King's Bench, in *Walker v. Maitland*, 5 B. & Al. 171, would introduce very troublesome and uncertain inquiries, and would be inconsistent with the security that should prevail in commercial transactions. If the plaintiff in this case had done what is usual, and had insured his goods against the perils of navigation, then, I think, it is quite clear, upon the case which I have just referred to, and others

which I shall presently cite, that, under the circumstances of this loss, he would have recovered. Then, as he omitted to insure, and at the same time accepted a bill of lading which expressly excepted damage arising from the perils of navigation, it is reasonable to look upon him as having taken upon himself the risk which the insurers would otherwise have taken, where the policy is in the proper terms. The master, when he sailed on this voyage, had a right to suppose that either the plaintiff was insured, or that he chose to run the ordinary risks himself; and I can see no reason why the same principles should not apply here as in insurance cases.

I refer to the case I have cited of *Walker v. Maitland*; to *Busk v. Royal Exchange Assurance Company*, 2 B. & Al. 73; *Bishop v. Pentland*, 7 B. & C. 219; *Holdsworth v. Wise*, 7 B. & C. 794; *Shore v. Bentall*, *Ibid.* 798; *Phillips v. Headlam*, 2 B. & Ad. 380; *Sadler v. Dixon*, 5 M. & W. 405, and same case in error, 8 M. & W. 895; *Redman v. Wilson*, 14 M. & W. 476; *Arnould on Insurance*, pages 770, 803, 1342; *Heyman v. Parish*, 2 Camp. 149; *Muddle v. Stride et al.*, 9 C. & P. 382. In *Buller v. Fisher*, 3 Esp. N. P. C. 67, Lord Kenyon ruled at Nisi Prius to the effect, that if there has been any degree of negligence in the navigating of the vessel, the loss will not come within the exception in the bill of lading of "perils of the sea," and the ship owner will therefore be liable; but this is treated at present as an inaccurate statement of the law.

Rule discharged.

MATTHIE V. ROSE.

Use and occupation—Liability for—Non-suit refused at first, and afterwards accepted.

The defendant made over to the plaintiff a farm in part payment of a debt, stipulating for a re-conveyance on payment of the sum for which it was accepted, with interest, in three years. Before this arrangement the farm was leased to one F., who continued in possession, paying rent to the defendant.

Held, that the defendant was not liable to the plaintiff for use and occupation.

Assumpsit on a common count for use and occupation, and on other common counts.

Plea—*Non assumpsit*.

The defendant being indebted to the plaintiff made over a farm to him valued for the time at 500*l*. in part payment, owing him still a sum beyond that. As he considered the farm worth more than the 500*l*. he stipulated for a right to get it back on paying the 500*l*. and interest in three years. It was conveyed to Matthie, in September, 1848. The defendant, before this arrangement, had leased the farm to one Freeman for six years; and after the transaction with the plaintiff, and up to the bringing of this action, he had received rent from Freeman. In September, 1849, the plaintiff and the defendant had some discussion about their affairs. The defendant offered to give a quit claim to the plaintiff, and to give him possession of the farm, if he would throw off the interest due him; and the plaintiff on his part had lately offered him the farm back, if he would pay part of the 500*l*. down, and the residue in a year. They came to no agreement, however, and disputed about their arrangement, the defendant affirming that the plaintiff, when he took the land, was to give a bond to reconvey, and the plaintiff denying it.

On this evidence the defendant moved in this action, brought by the plaintiff for use and occupation, for a non-suit, contending that there was no contract, express or implied, to pay for occupation, and no such relation as that of landlord or tenant existing, wherefore assumpsit for use and occupation would not lie, nor the action for money had and received, for that the rent from Freeman was not received by the defendant on the plaintiff's account. The

learned judge proposed to reserve the point, but the plaintiff insisted on the case going to the jury, and the judge was directing the jury to find for the defendant when the plaintiff elected to be non-suited.

G. Sherwood moved to set aside the non-suit. He cited *Tew v. Jones*, 13 M. & W. 12; *Bull v. Sibbs*, 8 T. R. 327.

McDonald, Q. C., shewed cause, and cited *Price v. Lloyd*, 3 U. C. R. 120; *Doe Roby v. Maisey*, 8 B. & C. 767; *Hellier v. Sillcox*, 1 L. J. (Q. B.) 295; *Standen v. Christmas*, 16 L. J. (Q. B.) 265.

ROBINSON, C. J., delivered the judgment of the court.

Unless something was said at the trial expressly reserving to the defendant leave to move against the nonsuit, this application should not be entertained; for nothing can be clearer than that, when the judge proposes to reserve a legal question for consideration in term, and the plaintiff insists on going to the jury, with a direction from the court upon the point, if, when he finds the judge giving such a direction to the jury as must result in a verdict for the defendant, the plaintiff interposes, and in order to save himself from being finally concluded by a verdict against him desires to be nonsuited, he cannot move afterwards against the non-suit; and if, under such circumstances, leave was given to him to take that course, it certainly is an indulgence contrary to ordinary practice.

But, except as this case might serve as a precedent, it is not important to question the plaintiff's right to move, because we are of opinion that the law is against him, and that the nonsuit is right.

The position of the plaintiff and the defendant in regard to this land is somewhat equivocal. They were neither on the common footing of mortgagor and mortgagee, nor was it a case of vendor and vendee. If it came under this latter description, the law is plain that, when a vendor after conveying remains in possession, no action lies by the vendee against him for use and occupation, unless there be something to shew that he was holding upon an understanding that he was to pay for his occupation; otherwise he is in merely as a trespasser liable to be dispossessed as such

at any moment. If we are to look upon the parties as standing in the relation of mortgagor and mortgagee, to which their case comes nearest, there is still no authority for the defendant as mortgagor being held accountable to the mortgagee for rents or profits in an action for use and occupation. What he has to pay is the interest on his debt, or rather his debt and interest, and until the mortgagee takes possession the mortgagor is substantially regarded as owner, and holding on his own account. The mortgagee may no doubt entitle himself to payment of rent from any tenant whom the mortgagor may have put in, by giving notice to the tenant that he must pay him; but no sanction can be found for subjecting the mortgagor to an action for use and occupation so long as he has been allowed to continue in possession undisturbed, and relying solely on the mortgagee's right to the rents and profits by virtue of his mortgage. All authority is against it, as well as the constant usage that prevails between parties under such circumstances. The cases of *Doe dem. Fisher v. Giles*, 5 Bing. 426; *Moss v. Gallimore*, Dougl. 282; and of *Birch v. Wright*, 1 T. R. 382, shew clearly that a mortgagor in possession is not liable for rent: I mean where there has been no agreement to that effect, and nothing to rest upon but a supposed implied contract.

We might indeed imagine from the language of the court in *Tew v. Jones*, 13 M. & W. 12, that in the opinion of the learned judges who decided that case, an action for use and occupation would lie by the mortgagee against the mortgagor; but that was not the question before them, and they rather allowed counsel to assume it than lay down such a proposition themselves. And it is quite clear that *Partridge v. Bere*, 5 B. & Ald. 504, which was referred to there as shewing that a mortgagor is liable to such an action, determines no such thing.

Nothing can be more express to this point than the language of *Littledale, J.*, in *Pope v. Biggs*, 9 B. & C. 245, where he says, "The mortgagee is not entitled to recover as mesne profits the bygone rents actually paid over to the mortgagor, because he suffered the mortgagor to remain in

possession and receive the rents; but as to those not actually paid over, he is entitled to recover them."

We are of opinion that the plaintiff was properly non-suited.

Rule discharged.

WRIGHT ET AL. V. COOK.

Promissory note—Set-off—Barter.

A. sold to B. certain goods, and a claim on one C. of 25*l.*, taking a horse in payment for the goods, and B.'s promissory note for the claim. B. took from A. an order for the goods on the warehouseman in whose charge they were, but on presenting the order he was unable to obtain them. *Held*, in an action by A. against B. on the note, that the defendant might set off the value of the horse.

Assumpsit on a promissory note of the defendant, made on the 22nd of January, 1850, to Wright, Bracketts, and Averill, or bearer, payable in eight months, for 25*l.*

The defendant, among other defences, pleaded set-off.

At the trial, before Sullivan, J., at Niagara, it appeared that one Davis was indebted to the plaintiffs in 25*l.* 9*s.* 6*d.*, and that the plaintiffs had sold him certain goods to the amount of 50*l.* and upwards, which had been sent to him from the plaintiffs, merchants in Toronto, and were lying in the warehouse of one Hodges at Port Stanley. The plaintiffs, finding, as it seems, that Davis's circumstances were bad, and that he failed to pay, sold the goods while they were lying there to the defendant Cook for 50*l.*, who gave his note to the plaintiffs for them, payable in eight months; but immediately afterwards, the plaintiffs' agent, wishing to buy a horse which the defendant had there, proposed to him that he would take the horse at 50*l.* in payment for goods, and give up his note which he had just made, provided the defendant would assume the debt of 25*l.* 9*s.* 6*d.* due by Davis to the plaintiffs, and would give his note for 25*l.* for the balance, payable in eight months. This was agreed to, and the note sued upon in this action, was in consequence given by the defendant.

The plaintiffs' agent at the time gave the defendant an order on Davis, requesting him to give the defendant authority to receive the goods from Hodges; and the defendant went soon afterwards and presented the order, but was told by Hodges that the goods were levied on by the sheriff for a debt due by Davis to a third party. The defendant never got the goods.

It was contended by the plaintiffs that the giving of the order to Hodges amounted to a delivery of the goods, though the defendant in fact never received them; and that the transaction being one of barter of the defendant's horse for the goods sold, the defendant could not make the horse the subject of a set-off, as upon an implied assumpsit by the plaintiffs to pay for him in money.

The defendant had given on account (presuming that he would get the goods) his horse, valued at 50*l.*, and his note now sued on for the balance, but he had been unable to get the goods, and he claimed the difference between Davis's debt to the plaintiffs which he promised to pay, and for which he looked to Davis, and the price agreed to be paid for the horse; and the verdict was given for this sum (25*l.*) with leave to the plaintiffs to move to have the verdict entered for them.

Eccles obtained a rule nisi to enter a verdict for the plaintiffs on the leave reserved, or for a new trial on the law and evidence, and for misdirection. He contended that the value of the horse could not be claimed as a set-off in this action, but that the defendant must bring his action against the plaintiffs for non-delivery of the goods, if they were not to be considered as having been actually delivered to him by the giving him the order upon Hodges. He cited *Harrison v. Luke*, 14 M. & W., 139.

Becher shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The case referred to of *Harrison v. Luke*, is not applicable, because there nothing had happened since the contract to alter the circumstances or change the liability of the parties. The plaintiff sued for the price

in money of certain goods for which the defendant had only promised to pay him in ochre. Here the plaintiffs sue the defendant on his promissory note for 25*l*. The defendant sets up as a set-off a horse sold and delivered to plaintiffs for 50*l*., and not yet paid for. The defendant imagined at the time that he was getting certain goods in payment for the horse which he had agreed to take; but he could not get the goods—not because the plaintiffs neglected to deliver them, or would not deliver them, but because the plaintiffs having already put the goods out of their hands and control, they had been otherwise disposed of, and the defendant could not obtain them on an order which the plaintiffs' agent gave him.

There was no agreement still open between the parties as to the delivery of goods. The plaintiffs' agent pretended to deliver them by his delivery order, but he was too late. It was the same in effect as if, while they were making their bargain the goods had been accidentally burnt while in Hodges's warehouse. The plaintiffs had bought in this case, as they would have in the case supposed, a horse of the defendant, valued at 50*l*., and meant to pay for him, and believed perhaps that they had paid for him by a turn which failed of its effects. It was in fact no barter, for nothing was given in exchange, and the plaintiffs continue liable for the price of the horse.

Rule discharged.

DOE DEM. DAVIDSON ET AL. V. GLEESON.

Trial by proviso.

Where the plaintiffs' attorney, at the defendant's request, countermanded notice of trial, and the defendant's attorney did not object, or afterwards move for judgment: *Held*, that the case could not be taken down to trial by proviso at the following assizes.

The defendant had gone into possession on an agreement to purchase from the plaintiffs, but failed in his payments, in consequence of which this ejectment was brought. Before the assizes in October, 1851, the defendant himself went to the plaintiffs' attorney, and earnestly entreated delay, alleging that he was expecting to sell the land, and would be able soon to make his payments. The plaintiffs'

attorney with some difficulty assented, and countermanded notice. It did not appear that the defendant's attorney made any objection, or attempted afterwards to get judgment as in case of a nonsuit, or moved for the costs of the day.

In the spring of 1852, the defendant carried down the record by proviso.

On the commission day, the plaintiffs' attorney gave notice that he objected to the notice of trial by proviso, and would move the court this term, if the defendant should proceed.

The defendant's counsel appeared at the trial, and confessed lease, entry, and ouster; and, no one appearing for the plaintiffs, a nonsuit was entered.

Leith moved to set the nonsuit aside. He contended that under the circumstances the defendant could not properly take the case down to trial by proviso.—*Smith v. Blundell*, 1 Chy. Rep. 226; *Dore v. Hayden*, 6 M. & W. 626.

Miller shewed cause, and cited *Mewburn v. Langley*, 3 T. R. 1; *The King v. McLeod*, 2 East, 206, note *b*; *Smith v. Rigby*, 3 Dowl. 705; *Phillips v. Dance*, 9 B. & C. 769; *Godfrey v. Wade*, 6 Moore, 488; *Draine v. Russell et ux.* 10 Jur. 392.

ROBINSON, C. J., delivered the judgment of the court.

In England it appears, from the case of *Smith v. Blundell*, 1 Chitty's Rep. 226, that a rule of court was necessary to be obtained for trying a cause by proviso. This necessity was dispensed with there by rule of court.—H. T. 2 Wm. IV. We have no corresponding rule here; but the defendant's attorney has assumed that he could, without any rule, give notice of trial by proviso, though by the former practice in the King's Bench in England a rule was required to sanction it. The trial by proviso is now in a great measure disused, the remedy by obtaining judgment as in case of a nonsuit being commonly resorted to; and clearly this was not a case in which this unusual course should have been taken, because the plaintiff was not in fault. He had not delayed the suit by any laches, but had only given way to the importunity of the defendant, and forborne to go to trial from indulgence to him, countermanding his notice.

As to the objection on the other side, that the plaintiffs should not have acceded to the defendant's request, but should have communicated with his attorney; it does not lie in the defendant's mouth to urge that. The trial by proviso is given for his protection in proper cases, that the cause may not be kept hanging over his head vexatiously; and we cannot allow him to complain of that as vexatious which was done at his own request, and by which he was no doubt much favoured. It cannot be imagined that his attorney would have objected to a kind indulgence being granted to his client, and we see no appearance in anything before us of the attorney having remonstrated against it, though he must soon have known it, until just before the second assizes he surprised the plaintiffs with notice of trial by proviso.

The plaintiffs were not in default. It was not therefore a case for trial by proviso, and we make the rule absolute.

Rule absolute.

WAFFER V. TAYLOR AND McLEAN.

Mortgagor, liability of, for use and occupation, and for waste—Nolle prosequi informally entered.

A mortgagor continuing in possession is not liable to the mortgagee for rents and profits, or in general for waste.

Where a *nolle prosequi* as to one defendant was filed only with the clerk at the assizes, the court held that it could not be recognized, and that a rule to reduce the verdict was therefore properly entitled as against both defendants.

The defendants made default in appearing. Judgment was signed on the 10th of April, 1852, and a writ of inquiry issued on a suggestion of the plaintiff that he was entitled to damages for use and occupation, and for waste. Damages were assessed at 7*l.* 10*s.*

At the assizes, the plaintiff's attorney filed with the clerk a *nolle prosequi* as to the defendant McLean, but that defendant was not discharged in any more formal manner.

The plaintiff, when he served his writ, had served a notice on both defendants that he intended to claim on the trial for the use and occupation, rents and profits of the premises, but the motion made no mention of waste.

The plaintiff first owned the land, and sold it to one Kenny, taking back a mortgage for the purchase money. Kenny paid only a small sum on the mortgage, and at the time of bringing the action was in default. The defendants held under him. The plaintiff proved that firewood had been lately cut by the defendant Taylor on the place, but not, as it seemed, for sale. By the deed no right of possession was reserved to the mortgagor.

The learned judge held that no action would lie for mesne profits or for waste, upon this evidence by the mortgagee against the mortgagor; but he allowed the jury to assess damages, reserving leave to the defendants to move to reduce the verdict to nominal damages.

Smith, Q.C., moved to have a verdict entered for the defendants, or for the plaintiff for nominal damages, on the grounds that the plaintiff was not entitled to recover from the defendants any damages, or any substantial damages; and that the evidence did not bring the case within the statute 14 & 15 Vic. ch. 114, secs. 12 & 13. He objected also that a *nolle prosequi* having been entered as to McLean, the rule should have been entitled as against Proudfoot alone. He cited *Pope et al. v. Biggs*, 9 B. & C. 245; *Keech v. Hall*, Dougl. 21; *Burne v. Richardson*, 4 Taunt. 720; *Doe v. Harlow et al.*, 12 A. & E. 40; *Hodgson et al. v. Gascoigne*, 5 B. & Al. 88; *Ex parte Temple, in re Skinner*, 1 Gl. & Jam. 218.

O'Reilly shewed cause, and cited *Colman v. The Duke of St. Albans*, 3 Ves. Junr, 25.

ROBINSON, C. J., delivered the judgment of the court.

We consider the rule properly entitled as in the cause against both defendants, there being nothing that we can recognize as the entry of a *nolle prosequi* discharging the defendant McLean.

The defendants, having allowed judgment to go by default, must of course be subject to have nominal damages assessed against them; but we think there was no foundation in the evidence for any further recovery. At the trial, damages seem to have been claimed by the plaintiff as mortgagee, only on account of alleged waste committed by

the defendants while holding under the mortgagor. If he had claimed damages as for use and occupation, or rather had gone for mesne profits, we think it clear he should not have been allowed to recover for them, for the reason given by us in the case of *Matthie v. Rose*, determined this term (a); our opinion being, that a mortgagor, while he is allowed to occupy, though liable to be dispossessed at any time, is not liable for rent or compensation in the nature of rent, as upon an assumpsit to be implied from the mere fact of the mortgagee having the legal title; and persons in possession under the mortgagor stand in the same situation. Then, as to damages for waste, the same principles apply. The mortgagee has his remedy in equity for restraining waste by the mortgagor, which remedy is only resorted to under particular circumstances; but we cannot hold as a general rule that the mortgagor of land in this country, suffered to continue in possession, is guilty of waste if he takes firewood for the use of his house, and nothing more than that was shewn here. All authority is against it. Besides, in this case the plaintiff was not in a situation to urge a claim; for in his notice, which he gave under the statute 14 & 15 Vic. ch. 114, sec. 12, he intimated no intention to claim on that ground. We consider it quite clear that this statute gives no right to recover profits or damages for waste in an ejectment case, except when the facts are such as before the statute would have given a right to recover in a proper action brought for that purpose. It gives no new right, only a more summary and convenient remedy.

We make absolute the rule for reducing the verdict to nominal damages.

DARLING V. WALLACE.

Ejectment—Description of part defended for; effect of—14 & 15 Vic. ch. 114.

Where in ejectment the defendant in his notice described the land for which he intended to defend as *a part of the lot mentioned in the writ*, he was not allowed to contend at the trial that what he defended for was not included in such lot, and therefore not the property of the plaintiff.

Ejectment for lot 1, in broken front concession of the township of Escott, in the county of Leeds.

(a) Ante page 602.

The defendant, by his notice, given under the new ejectment act, limited his defence to "*a part of the said lot mentioned in the said writ*;" describing such part by metes and bounds.

At the trial, before Burns, J., at Brockville, it was admitted that the plaintiff was the owner of this lot, but the defendant contended that the tract defended for was not embraced within it. The point disputed was, whether the patent for No. 1 covered a small piece of broken front between the even line in rear of the river and the river. The learned judge considered that the description and the plan produced shewed that the front was bounded by the river, from the one angle to the other; and besides, as the defendant in his plea and notice had expressly admitted that the small piece of land for which he was defending formed part of No. 1, and had further admitted that all the land in the patent produced did belong to the plaintiff, which patent professed to grant the whole of lot No. 1, that he was precluded from attempting to shew that the land which he claimed was not embraced within the patent; and under this direction the verdict was found for the plaintiff, reserving leave to the defendant to move for a nonsuit.

Richards moved for a nonsuit on the leave reserved, or a new trial on the law and evidence, and for misdirection. He cited *Doe dem. Gilkison v. Shorey et al.* 1 U. C. R. 341.

G. Sherwood shewed cause.

ROBINSON, C. J.—Our opinion in this case is that the defendant having by his plea and notice expressly defended for a part of the said lot, No. 1, mentioned in the writ, is not at liberty to contend at the trial that what he defends for is not a part of lot No 1, and on that account is not the property of the plaintiff. He undertakes to shew that the plaintiff for some reason has not a title to a certain part of No. 1, to which the defence is limited.

Rule discharged.

SCOTT V. VANCE.

*Trespass—Justification—Motives of defendant, when may be enquired into—
Right of defendant to a verdict on the general issue.*

To an action of trespass *quare clausum fregit* the defendant pleaded justifying the entry under a warrant of distress, and the plaintiff replied *de injuria*.

Heid, that under these pleadings, and under the facts proved, there could be no enquiry into the defendant's motives; that the plaintiff, having prevented the defendant from distraining, was not at liberty to shew that he had no intention of executing the warrant when he entered, *although nothing was done inconsistent with such an intention*. (This case was distinguished from *Lucas v. Nockells*.)

A defendant succeeding on a plea of justification, is not necessarily entitled to a verdict on the general issue.

The declaration charged that the defendant, on the 1st of August, 1851, and on divers other days, &c., broke and entered a dwelling house of the plaintiff, on Duke-street in Toronto, and broke doors, and disturbed the plaintiff in his possession.

The defendant pleaded—1. Not guilty; 2. That the plaintiff held the premises as tenant to one Mrs. Ward, at a certain rent, &c., payable monthly; that 4*l.* was in arrear for seven months' rent,—wherefore the defendant, as bailiff of Mrs. Ward, and by her command, entered into the said house, the outer door being open, to distrain for the arrears of rent, as he lawfully might, which is the same alleged trespass, &c.

The plaintiff replied *de injuriâ* to the second plea.

At the trial, before Draper, J., at Toronto, the plaintiff's son swore that the defendant came there about 8 o'clock, a. m., in August, and that the outer door being open he went in, but the room door opening from the passage was fastened; that the defendant asked to be let in, but the plaintiff refused; and the defendant, as this witness swore, kicked at the door, and with an axe went and struck against the door and split it, but did not gain admission, and that he went away and got assistance, and returned, but what he did afterwards was not shewn:—whether he entered, or what use he made of his entry, if he did get in.

It was proved that there was rent due to Mrs. Ward, the landlady, who gave the defendant a warrant to distrain, and the rent was afterwards paid.

The plaintiff's witness swore that he did not hear the

defendant say anything about rent, but that he asked for the key, and said he wanted possession of the house.

The defendant called a witness who swore that the door had not been split or struck with an axe, as the plaintiff's witness stated.

The learned judge told the jury that if they believed the plaintiff's witnesses they must find for the plaintiff on the first plea—that the replication to the second plea seemed informal, but, taking it as it stood, it only put in issue the fact of the defendant having such an authority as he had pleaded—in other words, whether he was Mrs. Ward's authorized bailiff, and went there to distrain—and if so, they should find for the defendant on the second issue.

The plaintiff's counsel contended that the replication put in issue not merely the existence of the authority, but whether the defendant went there to distrain, or for some other purpose. The learned judge considered that the jury were not at liberty to enquire into the motives of the defendant in going there; and upon such direction the jury found for the defendant.

Eccles moved to set aside the verdict as being contrary to law and evidence, and for misdirection, or to enter a verdict on the first issue for the plaintiff; he admitted that the position that the mere motive of the defendant was put in issue, was not sustainable, but he contended that the jury should have been told to enquire whether the defendant, though entering nominally under the distress warrant, was not actually endeavouring to get possession of the premises, and he relied on the case of *Lucas v. Nockells*, 4 Bing. 729, 10 Bing. 157; he cited also *Carnaby v. Welby et al.* 8 A. & E. 872; *Oakes et ux. v. Wood*, 2 M. & W. 791; *Price v. Peek et al.* 1 Bing. N. C. 380.

Vance (the defendant), contra, cited *Ellison v. Isles*, 11 A. & E. 665.

ROBINSON, C. J.—On the first argument of this case, I formed my opinion that the verdict was correct, and that there was no good ground for excepting to the learned judge's direction to the jury. But it has been strongly urged by Mr. *Eccles*, on the part of the plaintiff, that the

view given of the law at the trial was erroneous, being inconsistent with the principles on which the case of *Lucas v. Nockells* was determined, and later cases in which the courts have governed themselves by that decision.

I have no doubt now, after carefully considering these cases, in particular the judgment of Best, C. J., in *Lucas v. Nockells*, 4 Bing. 740, and the judgments given by Baron Bayley and by Mr. Justice Littledale in the same case in Error, 10 Bing. 182, 190, that although the defendant had legal authority to enter and distrain, yet if his conduct shewed that he did not in fact act upon that authority, nor enter for that purpose, the defence would not avail him. But looking at the facts of this case, I concur in the view taken of it by my brother Burns, and which he will state more at large, and according to which view of the law I think the verdict was properly given for the defendant, and ought not to be set aside on the ground of misdirection.

The defendant having authority to distrain upon goods in the plaintiff's house, goes for that purpose as he alleges in his plea. He found open access to a passage, common to the plaintiff's dwelling house and to another house, or houses, opening into the same passage. In entering into this passage he was not entering upon the exclusive possession of the plaintiff. When he desired to get admittance into the plaintiff's house by the door which opened out of this passage he found it fastened, and the plaintiff was inside forbidding his entrance. According to the evidence given for the plaintiff, the defendant endeavoured to force the door, and damaged it in the attempt. According to the defendant's evidence, he did no harm to the door whatever; and as the witness who swore this was disinterested, and had examined the door and found, as he declared, no mark of blows upon it, I dare say the jury were satisfied that no injury whatever had been suffered by the plaintiff, and that he had in truth brought this action for nothing: but, at any rate, the defendant being opposed and forbidden to enter, did not enter, but gave up his object, whatever it was, and went away. No case, I think, goes so far as to say that he can be made a trespasser, under such circum-

stances, by a jury considering that he had it not in mind to distrain, although he did nothing inconsistent with such an intention. This would be reducing the issue strictly to an inquiry into the motives of the officer, and not into the facts; for, being prevented from entering, he did nothing which, as in the case of *Lucas v. Nockells*, could be referred to a different intention from that of executing the process. The plaintiff assumes a right to say, "If I had let you into the house you would not have distrained, and therefore I treat you as a trespasser in endeavouring to enter." He calls on the jury to decide that he never meant to distrain, though he would not give the defendant the opportunity of shewing what he would have done.

The plaintiff's counsel has raised a question about his right to have a verdict entered for him on the plea of not guilty. If he was clearly entitled to it, and insisted upon it at the trial, we should, according to the practice, afford the defendant the alternative of consenting to a verdict being so entered on that issue; but, looking at the evidence, we are not certain that the jury would have found for the plaintiff on the general issue, if the plaintiff had urged it, and it had been left to them. But it is urged that whenever there is a special plea of justification found in the defendant's favour, the plaintiff must, as a consequence, be taken to be entitled to a verdict on the general issue, because he has succeeded on a plea which involves an admission that he committed the act. According to this there could never be a general verdict for the defendant in such cases, but the practice is constantly otherwise. In slander, when the defendant denies the speaking the words, and yet pleads that they were true, he often receives a general verdict.

DRAPER, J.—I think this case clearly distinguishable from *Lucas v. Nockells*. There the defendant did acts entirely inconsistent with the execution of the *fi. fa.*, after seizing or pretending to seize under it, and disposed of the goods seized in a manner consistent with a different claim or right they had to the goods. Then again, there was a new assignment as well as a traverse, though it is not very

easy to say what effect was given by the judgment to these particular pleadings. In this case the defendant did no act which the warrant to distrain did not authorize; on the contrary, he did not go nearly so far as his authority would have justified. He seized no goods—he never even got into the room where the goods were—he desisted from an attempt to distrain on being threatened with violence. The question of excess clearly does not arise on these pleadings. Rent was due to Mrs. Ward, and the jury, by their verdict, have determined that the defendant had a warrant from her, for this question was expressly left to them. The authorities clearly shew, that if he had authority, his mere declarations of a different purpose are immaterial. — *Crowther v. Ramsbottom*, 7 T. R. 654. Motive and intention were all that were insisted on at the trial as what should have been left to the jury, and as to these Mr. Eccles has very properly abandoned the objection.

But, in reality, that is all that could, upon the evidence, have been submitted in order to defeat the effect of the warrant, for no act is shewn to have been done for which the warrant is not a complete justification; and it does not appear to me consistent either with reason or authority, that because the defendant used language inconsistent with the warrant, and because he did not do more under it, and because he abandoned the prosecution of what the warrant authorized on meeting with opposition and threats, that he can be considered as a trespasser by reason of what he said, though he did nothing which he had not legal authority to do, and much less than that authority would have justified (*a*).

BURNS, J.—In cases like the present, when *Lucas v. Nockells* is relied on, it becomes necessary to compare the pleadings of the cases, and see clearly what the precise points are which are raised in issue. In *Lucas v. Nockells* the plaintiff replied to the defendant's justification under the writ, that the defendants of their own wrong, and without the residue of the cause by them in their plea alleged, committed the trespasses; and also new assigned that the

(*a*) *Groenvelt v. The College of Physicians*, 1 Ld. Raym. 454; 12 Mod. 386 S. C.

4 *i*.—VOL. IX., Q. B.

defendants, for other purposes than those mentioned in the plea, entered the ship, and that more violence was resorted to than necessary. In the case before us the defendant has pleaded that rent was due from the plaintiff to Ann Ward, wherefore the defendant as the bailiff of Ann Ward, and by her command, entered the house to distrain the plaintiff's goods, which is the trespass complained of. The plea does not enumerate what trespasses it is intended expressly to cover, as the form usually is, but is in effect a justification of the entry into the dwelling house, by the command of Ann Ward. The substantial trespass complained of in the declaration is the breaking and entering; the remainder is stated as aggravation. The plaintiff, by the general traverse, has put in issue whether any rent was due from him, and the authority to the defendant, as well as his right to enter under it for the purpose of distraining. It appears the defendant did not in fact complete the distress, but left the premises without effecting the object for which he went there. Under these pleadings, and differing as they do very materially, both in form and also in substance, as the nature of the two cases shew when we look at the facts of each, the question is whether the defendant's motives and intentions can be inquired into, as they might where the matter is a mixed question of law and fact, so inseparable as that the whole must be submitted to the jury.

1st. As to the general question,—I do not think the motives with which the defendant acted can be inquired into at all; and, under the pleadings in this case, it appears to me it is not open to the plaintiff to say that the defendant's authority was merely colourable, and the entry made for some other purpose than contemplated by the warrant. The judgment in *Lucas v. Nockells*, in the Exchequer Chamber, proceeded upon the ground that the new assignment opened the door to the inquiry, whether the defendants acted under the writ or not. Best, C. J., says, "If a man has done what he is justified in doing, and no more, the law in many cases will not permit his motives to be inquired into; as if he had a right to prosecute for a crime, or to arrest for a debt, there can be no inquiry with what

motives these acts are done ; but if he does more than as a prosecutor or creditor he had a right to do, he will not be justified, and it becomes proper to inquire whether the prosecution and arresting were not mere pretences." With this proposition I fully agree ; but I understand the language used, as indeed the whole judgment, to apply to the state of the pleadings, or, at all events, to the whole facts which the plea, irrespective of the new assignment, raised. That it must be so understood is clear from the argument of the defendants' counsel, and as noticed in the judgment, for it was put in defence on the broad ground that having the authority of the writ to do what they did the authority would protect, although the defendants did not act under it. The whole ground work of the first judgment was, that, by the replication and new assignment together, the plaintiff did not deny the motive with which the writ of execution was executed, but denied that the defendants, in doing what they did, used the writ, or sold the goods, or levied the debt by a sale under it. When the case came before the House of Lords, it is true, Mr. Justice Bosanquet proceeded in his judgment on the ground that the new assignment may be laid out of the question, and he was of opinion that it was competent for the plaintiff to shew that the acts of the defendants were not really done under, or in execution of the writ, but under another claim ; and that the writ, and proceedings under it, were a mere colour and contrivance to get possession of the goods. He carefully abstains from saying a word that can support the proposition that the motives of the defendant are inquirable into, but he rests his judgment upon the fact that it was proved the defendants had, after they obtained possession of the goods, made an illegal disposition of them. Mr. Justice Gaselee evidently, though not entirely so, relied much upon the new assignment. Mr. Justice Littledale thought the new assignment of no use to the plaintiff, and that the plaintiff could not have maintained his action by resorting to that. He rests his opinion upon the point that acts may be proved upon the traverse of the plea to shew that the writ was not acted under, but he says that if the execution

was executed, then he did not think it could be inquired into what motive the defendant had in suing out the writ. Mr. Baron Bayley says it was not necessary to say anything upon the new assignment, for he was of opinion that upon the traverse *absque residuo causæ* it was competent for the plaintiff to shew that the acts of the defendants were not really done under, or in execution of, the writ, but for another purpose and another claim; and that the writ, and proceedings under it, were a mere colour and contrivance to get possession of the goods. In *Oakes v. Wood*, Baron Parke says of *Lucas v. Nockells*, "if that case had established the general proposition, that the motive and intention with which an authority given by law was exercised could have been inquired into on the general replication *de injuria*, we must have held that such course must be pursued in all cases, thought it might be at variance with the supposed rules of law existing before; but we do not find any such general proposition established, either by the opinion of the majority of the judges, or the judgment of the House of Lords, so far as can be collected from the report of their lordship's proceedings." Now, on comparing the case before us with *Lucas v. Nockells*, we shall see that the evidence which the plaintiff desires should be submitted to the jury must inevitably open the very question which all the judges disclaim as being open in that case, and, as it appears to me, would in the case before us, if the evidence were received, be open, though not a question of law and fact inseparably mixed up together. In *Lucas v. Nockells* the defendants could not have rested their defence with simply shewing the judgment and execution, and the right thereupon to enter the ship, but they were compelled to go further in their justification, and say that the goods were seized and sold by virtue of and under the writ. It was proved as a fact, that, instead of the goods being in truth sold under the writ to satisfy its exigency, they were delivered over to the execution creditor for other purposes than to satisfy the debt, consequently the plea was untrue, and the legal inference was irresistible that the entry was but a pretence; and so in truth the writ, though valid for the purpose if used, was

not acted under, and the defendants were trespassers *ab initio*. The general traverse of the plea was well calculated to raise the issue determined in the case, because the defendants, to complete their justification, were required to establish the truth of the whole plea, and could not stop short with the entry merely. In our case the defendant has justified the entry only under the authority. The entry is admitted on both sides, and the traverse is whether the defendant had the authority to do what he^e did, and for the cause alleged. The defendant has proved that rent was in arrear, and that he had the authority of the landlady to distrain, and so he establishes a legal right to enter. In *Lucas v Nockells* the plea was disproved in fact by the acts of the defendants, but in this case the plaintiff proves no act in contravention of the warrant, but he desires that the defendant's motives and intentions with which he made the entry, should be made the subject of inquiry, and thus inferentially to make out that though the defendant had the warrant, yet that he did not act under it. The distinction between the cases appears to me to be this—in the one, acts were proved which the issue warranted to be received in evidence, from which motives would be inferred that would, not being justified, render the parties trespassers; in the other, the plaintiff wishes to establish motives from which the inference of a wrongful act is to be drawn. In the first it is founded upon reason, and on authority in every branch of the law, that it should be so; but in the second, reason is against it, and no authority can be found to sustain the position. If the defendant had committed any excess in the execution of his warrant, that should have been replied, and the plaintiff might have done that, though at the same time he denied the legal right to enter. The defendant proved his plea, and, as it appears to me, the plaintiff can in no way disprove that position but by an inquiry into the motives and intentions of the defendant. There is nothing subsequent to the entry set up in defence or traversed which could by possibility bring in question any act of the defendant upon which to found an inquiry respecting his original motives, and therefore, the moment

we go in this case beyond the warrant, the inquiry must necessarily result in one of motives and intentions. No object is set forth in this plea as being accomplished by means of the warrant, the inquiry into which might determine whether the defendant was to be treated as a trespasser *ab initio*.

2. Can the defendant's motives and intentions be inquired into, because he has not stated that the distress was not completed under the warrant? Here again the case differs from *Lucas v. Nockells*, for in that case the action was for seizing the goods as well as entering the ship, and in this case the action is only for breaking and entering the house. The defendant has justified what the plaintiff complains of, and he could not be called on to do more. I do not see that the non-execution of the warrant, because the defendant could not fulfil it, places him in a less favourable position than if he had executed it. Whether the defendant executed it or not is not in issue between the parties, and I fail to see that there is any distinction between the execution and non-execution, as respects the question of how far the plaintiff can go in an inquiry as to the motives and intentions. In *Lucas v. Nockells*, it was not the non-execution of the writ which rendered the defendants liable, but it was the illegal execution, by which the court held that the defendants must be treated as not having acted under it. Mr. Justice Littledale said that if the writ be once executed, then the motives and objects of the party are not inquirable into. I can perceive no sensible distinction that should exist in a case where the defendant has been prevented from executing the writ by the plaintiff himself. It appears to me it would be a singular position to hold that where no acts are put in issue between the parties, which if in issue the illegal execution of would afford evidence of motives and intentions, therefore motives and intentions may be inquired into, from which to draw an inference that an act intended to be done under the warrant would have been illegal if completed.

I think the verdict was right under the direction given, and that there should be no new trial.

Per Cur.—Rule discharged.

GRIERSON V. THE PROVISIONAL MUNICIPAL COUNCIL OF THE COUNTY OF ONTARIO.*

By-law—Objections to not apparent on the face—Mode of imposing rates for county purposes—12 Vic. chaps. 78 & 81—13 & 14 Vic. chaps. 64 & 67—14 & 15 Vic. chaps. 109 & 110.

It is not necessary that a by-law to raise money for county purposes should contain all the provisions required to perfect the measure; and, therefore, the same by-law which provides for raising the loan and imposing the rate, need not apportion the sums to be paid by each municipality, for that may be provided for by a subsequent by-law.

A by-law imposing a rate for county purposes, to be levied on the *actual* value of all taxable property in the county, is not objectionable, though in villages, &c., the taxes are directed to be levied on the *annual* value, for such direction is intended only to apply to rates imposed for their own purposes.

The court is not bound under the act to quash a by-law, unless it appear to be illegal on the face of it. Where it is attempted to be proved so by extraneous evidence, it may be discretionary with the court, upon such evidence, when acting under their common law jurisdiction, to say whether the by-law shall stand or not.

Cameron, Q. C., in Michaelmas term, obtained a rule nisi on the defendants, to shew cause why a by-law, passed for raising a loan of 6000*l.* for the erection of a court-house and gaol in the county of Ontario, should not be quashed, with costs:

1. Because the said provisional council which passed it has no power to levy any rate on the ratable property of the village of Oshawa, being an incorporated village within the said county.

2. Because the rate levied on the property in the said village should have been assessed upon the annual, and not upon the actual value of the ratable property of the said village.

3. Because the assessed value, whether annual or actual, should have been stated separately and distinctly in the by-law.

4. Because the actual value of the ratable property in the village, for 1851, is wrongly estimated in the by-law, on the assessed value of the ratable property of the whole county.

* This case was decided in Michaelmas Term of this year, but it is reported without delay, as involving questions of very general importance with respect to the municipal corporations.

5. Because the annual ualue of the ratable property of the village for 1851 was 5550*l.*, equal to an actual value (under the assessment law) of 92,500*l.*, while the council have apportioned the rate in the by-law on 61,666*l.* as the actual value upon the said assessment of 5,550*l.* of the annual value of the ratable property of the said village.

The by-law moved against was passed on the 7th of September, 1852. It is a by-law to raise, by way of loan, 6,000*l.* and interest, payable within twenty years, for the erection of a court-house and gaol within the county of Ontario, viz., in the village of Whitby. It recites that it will require '9,780*l.*, to be raised by a special rate, for the payment of such loan and interest within twenty years from the 7th of September, 1852; and it specifies the sum to be raised under it in each of the twenty years. It also recites that the amount of ratable property in the county of Ontario amounts to 1,459,760*l.* assessed value for 1851, and that it will require the several rates in the pound mentioned in the schedule annexed to the by-law, on such ratable property as a special rate for the payment of the interest and the creation of a sinking fund for the payment of the principal of the loan, according to the 177th section of 12 Vic. ch. 81, as amended by statute 14 & 15 Vic. ch. 109.

And the by-law enacts that the warden may negotiate for and raise such loan, and may issue debentures for the same, and that the money shall be applied to the purpose recited; that the rates imposed shall be raised and collected in addition to all other rates, and that the by law shall take effect from its date.

In the schedule of rates referred to in the by-law, as forming part of it, are inserted the fraction of a penny in the pound which is to form the rate in each of the twenty years; *ex. gr.* in 1852 to make 660*l.*, the sum to be raised in that year, $\frac{1980}{18247}$ of a penny in the pound is imposed; for 1853, to make 642*l.*, the sum to be raised in that year, $\frac{1926}{18247}$ of a penny is the rate imposed.

This application against the by-law was supported by an affidavit of Thomas N. Gibbs, that he is reeve of the village of Oshawa, and as such took to the County Council of

the United Counties of York, Ontario, and Peel the certified return of the clerk of the Municipal Council of the Village of Oshawa of the assessment roll of that village for 1851; that it amounted to 5,550*l.*, as the annual value of the ratable property in the village; that that sum was assessed as the annual value for that year (1851); that it was adopted by the Provisional Council as the assessment for that year, and was made the basis for the rate to be levied under this by-law; that the same Provisional Council, in estimating the actual value of the ratable property of Oshawa for 1851, have made it 61,666*l.*, and on such actual assessed value have based the estimate, and levied the rate in the pound for the purpose of this by-law; whereas the actual assessed value, based on the annual assessed value as it should be by law, would amount to 92,500*l.*

There was annexed to this affidavit a certified copy of the assessments in the county of Ontario for 1851, on which the assessment under this by-law was directed to be made. This paper, signed by the clerk of the county of Ontario, and to which their seal was attached, gave the "return of the aggregate value of the assessed property in 1851, as rendered by the several township clerks;" and in this return Oshawa village was included as having assessed property of the actual value of 61,666*l.*, and of the yearly value of 5,550*l.* The clerk certified in this paper that the valuations contained in it were the valuations on which this by-law was based.

In opposition to this application it was sworn that the taking 61,666*l.* as the actual value arose from a mistake, into which the council were led by Gibbs, on whose affidavit the application was founded, and who took upon himself to reduce the value returned to 61,666*l.*, on his own idea that that was a fairer valuation, being a member of the finance committee of the united councils.

The warden swore that he did not know until June last that the sum of 61,666*l.* was not the full value. And it was sworn by the clerk of the Provisional Municipal Council of Ontario that he took the returns from the printed minutes of the county councils of the united counties

which stated 61,666*l.* to be the actual value; that he believed it to be correct, and found, on endeavoring to prove its correctness by the sums imposed on the several localities by the county council, and upon Oshawa as one of them, "that the sum so stated to be levied on Oshawa, at the rate therein given, did correspond with a fund representing 61,666*l.*: that he never knew till after the by-law was passed that the actual value in regard to Oshawa had been misstated, and first learned it from Grierson (the applicant) and Gibbs, when Gibbs admitted that he had adopted the 61,666*l.* as correct in framing by-laws for other purposes, and that the return of the council had been made out from a return for Oshawa in the handwriting of Gibbs himself: that the difference in the taxation of Oshawa produced by the error is in favor of Oshawa for the first year of such taxation (1852), and only amounts to 13*l.* 17*s.*

Wilson, Q. C., and *Connor*, Q. C., shewed cause; they cited *Rex v. Stacey*, 1 T. R. 1; *Rex v. Smith*, 3 T. R. 574.

Cameron, Q. C., and *Hagarty*, Q. C., contra, cited *Rex v. The Justices of the West Riding of Yorkshire*, 12 East. 117; *Bates v. Winstanley et al.*, 4 M. & S. 429; *Mercer v. Davis*, 10 B. & C. 617.

The statutes referred to are noticed in the judgment of the court.

ROBINSON, C. J.—I should have taken more time to make up my mind upon this application, if I were not apprehensive that considerable public inconvenience might arise from the county being kept long in suspense.

I have examined all the statutes which seem to bear upon the question, and though I cannot declare myself to be free from doubt on one or two points, my opinion is that there is nothing in this by-law which it is our duty to set aside as illegal.

The enactments which seem necessary to be considered in connection with the subject are the following:—12 Vic. ch. 81, sec. 36; sec. 41, subsecs. 2, 21, 22; sec. 60, subsec. 22; secs. 155, 176; 177, as amended by 14 & 15 Vic. ch. 109, sched. A. No. 24; sec. 179:—12 Vic. ch. 78, secs. 11, 12, 14:—13 & 14 Vic. ch. 64, secs. 9, 11; sched. A. part 32,

amending sec. 172 of 12 Vic. ch. 81 :—13 & 14 Vic. ch. 67, secs. 6, 11, 13, 21, 31, 32 :—14 & 15 Vic. ch. 109, secs. 4, 10, sched. A. No. 24 :—14 & 15 Vic. ch. 110, secs. 5, 6.

It would be unreasonable to expect that in such a multitude of provisions there should not be found some real or apparent inconsistencies, and some enactments of which we do not readily see the intention and effect.

I take it to have been meant by the legislature, that by-laws to be passed in towns and villages shall impose their rates for the purposes of such towns, &c., upon the annual value of property liable to taxation. In townships it is the actual value that is to be rated, and the county councils are to be furnished with returns of the actual value of ratable property within every municipality, including cities, towns, and villages, as well as townships. And it seems to be intended that the municipal councils, having before them the aggregate ratable property within every municipality, when they desire to contract a loan for any county purpose, shall assign to such locality its proportion to be contributed towards such loan, and shall by a by-law direct that to be levied and collected within such municipality. But such by-laws need not, as I conceive, to be law in which provision is made for the loan, and for imposing the aggregate annual rate to meet it. All that is necessary is that the county council must pass such a law, which will be the authority to the village municipality to add that to the other sums to be contributed in that year for county purposes; and it rests with the village municipal council to take the necessary steps for raising the aggregate sum for all county purposes as the law directs. The taxes will be raised by the village collectors, and paid to the treasurer of the locality, who is to pay over the money to the county treasurer. This is provided for by the 172nd clause of 12 Vic. ch. 81, as amended by 13 & 14 Vic. ch. 64, schedule A. 32.

As to the mode of laying the rates, the assessment act, 13 & 14 Vic. ch. 67, sec. 6, provided that they should be levied upon the whole taxable property, real and personal, in proportion to its value. This gives one general rule for

all ; and it means, as I suppose, the actual, not the annual, value. The 11th and 13th clauses seem to be intended to apply to by-laws of the village councils imposing rates for the purposes of the locality ; sections 31 and 32 of the same act provide for the case of rates to be levied in each locality for county purposes ; and the 31st clause, for some purpose, does require that the annual value shall be returned to the council, in regard to localities, such as incorporated villages, where taxes are directed to be levied by a rate on the annual instead of the actual value.

It is the fourth clause of the statute 14 & 15 Vic. ch. 109 which directs how by-laws for the purpose of raising loans for county purposes shall be framed ; and I see nothing in that inconsistent with what I believe to have been intended throughout—namely, that the county council, in regard to all sums which they authorize to be raised by loan for county purposes, are to lay their rate in the pound on the actual value of all taxable property in each locality, which rate is to be founded on a computation of the loan required to be raised, its proportion to the aggregate value of all the ratable property in the county, and the proportion which the ratable property in each locality bears to the whole.

I do not indeed at present understand how the different enactments could be carried out, unless for such purposes the county council take as their basis the aggregate actual value in all localities, and lay the assessment upon that. I do not see how a calculation could result in one rate upon property assessed by the two modes of taxation ; and I confess I do not see clearly what is meant by the sixth section of the 14th & 15th Vic. ch. 110, unless it is to give the rule by which the councils are to turn the annual value of village property into actual value, for the purpose of combining all in one sum representing the actual value.

However, what we have now to consider is, whether this by-law is on the face of it in the whole or in part illegal. It seems to me to follow closely the directions given in the fourth clause of 14 & 15 Vic. ch. 109. It recites the sum to be raised by loan, the object of the grant, and the amount which it will be necessary to collect in each year in order

to pay off the debt and interest within twenty years, and it specifies when such amounts shall be payable; next it states what is the amount of the whole ratable property of the county, which surely must be meant by the act to be the whole amount according to its valuation; and, lastly, the rate in the pound upon that property, which cannot but be a rate imposed according to one uniform basis of valuation.

Now, as to the objections to the by-law, taking them in their order: First. The county council is not by this by-law laying any rate upon property in Oshawa; they are only providing for raising a loan, and securing repayment to the person who shall advance it. This we must take to be merely the foundation of other measures which are yet to be passed. The question is only whether this by-law is legal so far as it goes, not whether it does all that is necessary to be done for perfecting the measure.

Secondly. The county council will have to direct hereafter, if they have not already done so, what sum Oshawa must contribute in each year towards repayment of this loan; and when the village council comes to raise the money, they will have to take care that they do so by such a method of taxation as the law allows.

Thirdly. I see no necessity for this by-law containing more than it does. The County Council will no doubt have to pass a by-law stating what sum in each year Oshawa must contribute.

Fourthly and fifthly. I do not see at present that the council could do otherwise, if they comply with the act, than give the actual aggregate value.

These exceptions turn upon something extrinsic of and behind the by-law; and I consider, as I have already stated on a former occasion, that if we should assume a control over by-laws upon such grounds as are relied upon in this exception, it would not be properly under the 155th clause of the 12th Vic. ch. 81, but under our common law jurisdiction in such cases; and, looking at the affidavits filed, I do not think that we should be exercising a sound discretion in setting aside a by-law for a purpose of such

magnitude, and at the risk of producing much public inconvenience, upon an allegation of an error in amount which in its result must be so insignificant—when the effect of it too, supposing the error to have been committed, is to diminish, though in a very slight degree, the burthen upon the village of Oshawa.

BURNS, J.—The first point to determine is, whether there be anything on the face of the by-law in question which renders it illegal; and if not, then, secondly, are the facts extraneous, such as must necessarily compel the court to quash it.

The recitals in the by-law appear to me sufficiently to comply with the requisitions of the 177th section of 12 Vic. ch. 81, as amended by ch. 109 of 14 & 15 Vic. The statute enacts that thereafter every by-law for creating a debt or contracting a loan, shall recite or set forth by way of preamble four things. This by-law does recite these matters, but it is contended that the spirit of the act of parliament requires that the by-law should enact the matters, and that merely reciting is not sufficient. The legislature could never mean that the corporation must in every such by-law enact, for instance, that the whole ratable property of the county amounted either to one sum or to another sum. It would be sufficient to recite what the ratable property amounted to, in order that it might be seen whether the rate proposed to be levied would be sufficient to liquidate the debt within the time mentioned. Of course, notwithstanding the recitals, it would be necessary that the by-law should enact or give authority to create the debt, and to bind the corporation to pay it, and to enact the special rate to be levied upon the property of the county liable to be rated. This is done, I think, as plainly as it could be done.

It is next objected that the county has no power to levy any rate on the ratable property of the village of Oshawa, an incorporated village within the county; and it is contended that the County Council should have signified to the corporation of Oshawa what proportion of the sum was required from that body; and then the authorities of the latter body were the proper authority to direct the amount

to be levied, according to the annual value. This objection is founded, in my opinion, upon an entire misconception of the scope and authority of the county council. This body is composed of the town reeves and deputy town reeves of the several townships, villages, and towns in each county, with the power according to the 22nd sub-division of sec. 41 of 12 Vic. ch. 81, of levying, collecting and appropriating such moneys as may be required for its legal purposes, by means of a rate or rates to be assessed equally on the whole ratable property of the county liable to assessment. When the county council has determined the amount which each township or incorporated village or town in the county shall contribute, it is the duty of the county clerk to certify the same to the township, town, or village clerk; and in his turn it is his duty to make out a collector's roll for the township, town, or village, in which the county rate shall be described separate and distinct from the township, town, or village rate.—Vide secs. 31 & 32 of ch. 67, 13 & 14 Vic. The collector's duty is to collect all the rates upon the roll, and pay over the same to the treasurer of the township, town, or village; and such treasurer shall pay over to the county treasurer the portion belonging to the county. And if the corporation of the township, town, or village do not cause the amount to be paid over to the county, the treasurer of the township, town, or village, and his sureties, are liable to the corporation of the county; and the collector also if he be in default, shall be liable to the county council, *whenever they shall choose to proceed against him, instead of against the corporation of such town or village.*—Vide sec. 172 of ch. 81, 12 Vic., as amended by sch. A of ch. 64, 13 & 14 Vic. But, to shew that incorporated villages within a county which are represented in its council stand upon the same footing with townships, we have only to read the 59th section of ch. 81, 12 Vic., which enacts that the municipality of every village which shall be formed under the provisions of the 58th section shall have the same powers, duties, and liabilities as the municipality of a township; and the officers thereof shall have the like powers, duties, and liabilities. Oshawa was erected into an incorporated

village by the act itself, but we can hardly imagine the legislature intended that those villages incorporated by the act should stand on a different footing from those which might become incorporated under its provisions.

The other objections to this by-law are founded upon the facts of the case, independent of anything upon the face of the by-law. A very important question arises upon this branch of the subject, and it is this--to what extent the court is bound to give way to objections which may be made to the legality of by-laws, which depend upon extraneous matter. I have already said, in *Rolls v. the Municipal Council of Welland*, that where a by-law did not disclose something illegal on the face of it, and such illegality depended upon something to be made out by other evidence, the court was not, in my opinion, called upon to notice any objection which the evidence did not clearly point at, and upon which the council should have notice, and be called upon to answer. It appears to me reasonable it should be so; and, applying the same train of reasoning in this case, I do not think the legislature intended that the court should be compelled to avoid a by-law, because it could be made out by proof that some error was committed in a calculation, or something of that sort done, which would in strictness be illegal. If we were bound to such strictness, we might find that we should be obliged to decide all things done under a by-law illegal and void, because after some months it was found that an accidental mistake had been made in a column of figures. I am of opinion that the true construction to give to the powers vested in the court to quash by-laws is, that, unless the by-law be illegal on the face of it, it rests discretionary with the court, upon extraneous matters, to say whether there is such a manifest illegality that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained. This view is, I think, strongly fortified by the case of *Jones v. Johnson*, 5 Ex. 862. That case arose upon the 92nd section of 5 & 6 Will. IV. ch. 76, the Municipal Corporations' Act of England, very similar to ours. Under the section mentioned, the rents and proceeds of all corporate property, and all fines received, were

to be carried to account of the borough fund ; and payment of debts, &c., salaries of the recorder, town clerk, treasurer, and other officers, and election expenses, were to be paid out of such fund ; and then the section enacts—“ *and in case the borough fund shall not be sufficient* for the purposes aforesaid, the council of the borough is hereby authorized and required from time to time to estimate as correctly as may be what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this act ; and in order to raise the amount so estimated, the said council is hereby authorized and required from time to time to order a borough rate, in the nature of a county rate, to be made within their borough ; and for that purpose the council of such borough shall have within their borough all the powers which any justices of the peace,” &c. The question depending was, whether the rate declared under this authority was retrospective or prospective, it being contended that if retrospective the rate was void. Whether it were the one or the other had to depend upon evidence extraneous to the order. It seemed that some previous debts were included in the rate. The plaintiff resisted the payment of it, and replevied his goods when seized under a warrant. Chief Baron Pollock says—“ In my opinion, it never could have been intended that so many difficulties should be thrown in the way of making a rate. We ought, therefore, to give such effect to the words of the statute as will best meet the exigencies of the case. The legislature has provided that the borough council is to make an estimate, if that can be done, for the purpose of providing prospectively for those expenses. It may, however, happen that this may not be possible, although made with all due care and fairness. It may be that the prospective estimate will fall short of the demand upon it, or persons may fail to pay their rates, or the rate may become unproductive from some other cause. It is impossible for the council to guard against all such matters. It therefore appears to me that under such circumstances, if a rate is made prospectively, and it turns out to be inadequate to the occasion, and

another rate is requisite, it is competent to the council to make it. But the question here is whether the rate is prospective or retrospective; and I am of opinion that in point of fact it is prospective, for it was made *bona fide*, and for the purpose of providing for payments which it was expected would become payable thereafter." In the same case Baron Parke says—"The next question is, whether this rate is bad as being retrospective, on the ground that the estimate of the council included by-gone expenses; and the principal objection is, that the solicitor of the corporation paid a certain sum of money for costs, to save the corporation from an execution, which sum was to be included in the bill that he had not then delivered. I think this circumstance does not affect the question as against the defendants, for they issue their warrant in respect of a rate which, upon the face of it is perfectly good. The council have estimated the money which is to be repaid to the solicitor; and, although the rate be in fact made in part for by-gone expenses, it is not a bad rate as regards the defendants unless it be clear on the face of it that it was meant to include by-gone expenses. In *Chesterton v. Farlar*, which has been referred to, in a suit for the nonpayment of a church rate, a prohibition was moved for to the Privy Council, to which an appeal had been made, on the ground that the rate appeared to be retrospective and bad from what appeared upon the pleadings. This court refused a prohibition, the cause being before a court the jurisdiction of which was not denied, no erroneous proceedings having taken place there, and the court refusing to presume that the judicial committee would act incorrectly. *Rex v. Sillifant*, 4 A. & E. 354, seems to shew that where a rate was regular on the face of it, but appeared to have been made to meet past disbursements, it was not therefore bad, whatever objection might be raised to a retrospective application of the money in passing the churchwardens' accounts. Therefore, in the present case, if the town council were wrong in making a retrospective rate, no advantage can be taken of that fact in an action against the defendants in this case, being the magistrates who enforce the rate by dis-

tress. I by no means say that the town council were wrong in the course they took. They thought they were right, and there was nothing fraudulent in their conduct. Some latitude must be allowed them under the circumstances; for they cannot ascertain in all cases with exactness the amount of money that will be wanted, but are bound to raise as nearly as possible the sum that will be required." I have quoted from this judgment at considerable length, because the principle upon which the by-laws of the different municipal corporations may be attacked is very important to be well considered and understood. It will be seen that the case mentioned was brought before the court by the party from whom the rate was claimed resisting the payment, and when his goods were seized having replevied them; and he contested the right to make such a rate by shewing matter not upon the face of it, whereby to avoid it as illegal. If the inhabitants of Oshawa, or even any one of them, contest the legality of the present by-law, it is, I conceive, open to them to take the same course as in the case cited, and then they may obtain the opinion of the court of last resort in such case. Authority being conferred upon the court to quash, by a summary application, such by-laws as may be illegal in the whole or in part, must, I think, be qualified by the question whether the same be illegal in the whole or in part upon the face, and that a discretionary power must be vested in the court in cases where the illegality is to be proved by matter extraneous. If any of the collectors have found it necessary to enforce the payment of the rate by distress, and we should quash this by-law, they would be trespassers, having nothing to fall back upon and justify their proceedings. Besides, if parties have paid their rates under pretence of a good by-law held out to them, of which they could not be supposed to know whether it were good or not, what is there to prevent the recovery back of the money so paid? All these difficulties are liable to occur, independent of the fact of involving the holders of the county debentures in troubles, that they from reading the by-law in question could not for a moment suppose themselves subject to.

The objections made, as appears from the affidavits, are several. First, that the rate upon the property of the village should have been assessed upon the annual and not upon the actual value of the ratable property. There is nothing in this objection. The 120th section of ch. 81, 12 Vic., enacts that in future the collectors' rolls for the different townships, incorporated villages, and wards, shall contain the amount of the assessed value of the real, and also of the personal property of each person whose name shall appear upon such roll. The 11th section of ch. 67, 13 & 14 Vic. enacts that the sums which shall be required by law, or by any by-law of any township or county, shall be taxed, rated, and raised upon estimate of the amount required; but in cities and incorporated villages the taxes shall be imposed by by-laws, declaring the yearly rate in the pound to be levied on the yearly value of all taxable property; and the yearly value of taxable personal property shall be held to be six per cent. on the assessed value thereof. The meaning of this provision clearly is, not that the county rate upon incorporated villages shall be levied according to the rate which the incorporated villages are bound to levy upon themselves for their own purposes. but that the city or incorporated villages are bound to levy their rates in one mode, and the townships and counties in another. The incorporated villages within the county, as regards the county rate, will be equalized with other portions of the county, which they would not be if the rate were levied according to the yearly value, including personal property, in the mode mentioned. The 120th section of ch. 81, which I have before refereed to, and the 31st section of ch. 67, shew what is required, and what is to be done by the clerks of the towns, incorporated villages, and townships, and this is, as it is expressed, to be for the guidance of the county council, which is directed by by-law to say what portion of such sum as the county may require shall be levied in each township, or incorporated town or village.

The next objection is, that the assessed value of the ratable property in the village of Oshawa, whether annual or

actual, should have been stated separately and distinctly in the by-law. I can discover nothing throughout the acts to lead me to suppose that the legislature placed incorporated villages within the county upon a different footing from the townships, except as to their internal government and mode of levying rates for their own uses and purposes.

The next objection, however, is the one mainly relied upon to avoid this by-law, and that is, that the ratable property for Oshawa is put down at 61,666*l.*; whereas, upon a calculation of the annual value of 5,550*l.* at six per cent., it should have been 92,500*l.* I am not prepared to say that what the council did was an error: on the contrary, it may be right that they should assume the ratable property of Oshawa to be 61,666*l.* I look upon the latter part of the 11th section and the 13th section of the Assessment Act, ch. 67, 13 & 14 Vic., to be special provisions for cities and incorporated towns and villages in regard to their own taxation, and not to apply to taxation for county purposes. It is assumed that 5,550*l.* yearly value should produce, as ratable property, 92,500*l.*; but I do not see that such must necessarily be so. As to whatever proportion of the 5,550*l.* covered the taxable personal property of the village, it would be so, but a different result might be the case as respects the real estate. As regards the latter, every separate tenement with a quarter of an acre or less shall be estimated at the real rack rent or full yearly value, and the vacant land shall be estimated at an interest of six per cent. yearly on the full actual value thereof. The vacant land being so estimated, it is capable also of being turned into an amount of ratable property by calculation, as in the case of personal property. As respects the real estate occupied, there being no criterion by which to turn the rack rent or full yearly value into its full value, as the assessors would appraise the same in payment of a just debt due from a solvent debtor, it is impossible to ascertain what its ratable amount would be without a calculation from some given data; and without that it is matter of opinion what the probable actual value, as if taken in payment of a debt, might be. That these provisions are applicable specially

to cities and incorporated towns and villages, I refer to the language of the 6th section, which enacts that the taxes to be levied either under the Assessment Law or the Municipal Corporations' Act, when no express provision shall be made in respect thereof, shall be levied upon the whole taxable real and personal property of the locality to be taxed, in proportion to the assessed value thereof. Unless that be so, and unless it is the duty of the county council to equalise the taxation in proportion to the assessed value of the property of the county, I cannot understand the provisions of the 31st section, which enacts that the county council shall by by-law direct what portion of the sum required for county purposes shall be levied in each township or incorporated town or village. If my view be the correct interpretation of the legislative enactments, and if the powers of the county council be as I have stated, it then follows that we cannot say that the council did wrong in fixing the ratable property of Oshawa at 61,666*l.*, for we have no data given as to the proportion of the 5,550*l.* which may have been assessed upon occupied real estate. But, if we must necessarily assume that the whole 5,550*l.* must be turned upon a six per cent. calculation without reference to the variation there may be between the real value and the rent of occupied lands, in order to produce the whole amount of ratable property, then it is shewn on the part of the council that they acted *bona fide* in the matter; and there does not appear to have been any idea or intention that one portion of the county was intended to be favoured more than another, or that one should be taxed lighter than another.

It appears to me that the rule should be discharged, and it must be with costs.

DRAPER, J., concurred.

Per Cur.—Rule discharged.

DOE DEM. CAMPBELL v. CROOKS.

Patent—Inconsistent description of land granted—Appropriation for clergy reserve, effect of.

In a patent the land granted was described as “a certain parcel of land in the township of Niagara, containing by admeasurement thirty-five acres, be the same more or less, which said thirty-five acres of land are butted and bounded as follows, &c.” It appeared that the boundaries given would embrace about seventy acres, including several lots in the town of Niagara. (From the facts proved it was clear that this was not the intention of the government in making the grant.)

Held—First, that the description of the land as in the township of Niagara coming first must govern, and the boundaries be regarded as erroneous; and therefore that no land could pass which at the granting of the patent was included in the town.

Secondly, it being shewn that in patents bearing date both before and after that to the defendant, the lots claimed by him were declared to be set apart as clergy reserves; that such declaration was conclusive as against the crown, and would prevent the land so appropriated, from passing to the defendant, independently of the first objection.

Ejectment for lots 84, 85, and 86, in the town of Niagara.

Mr. Crooks defended for thirty-five acres, situate in the town of Niagara, formerly in the township of Niagara, describing them as they are described in a patent to the Hon. D. W. Smith, hereinafter mentioned; and it was explained at the trial, that he defended for lots 84 and 85, and part of 86.

At the trial, before Robinson, C. J., at Niagara, it appeared that, on the 25th of May, 1796, David William Smith, who was then Surveyor General of Upper Canada, petitioned the Lieutenant-Governor in Council, setting forth that his late father “memorialled the government to grant him a small farm *adjoining the town of Newark*,” that he, the petitioner, had abandoned the possession of so much of it as fell within the military reservation at Mississagua Point, by removing the fences and orchards, and by commencing to pull down the buildings, and he prayed the government to grant him “what remained lying *between the said reserve, the town of Newark*, a small run of water and Lake Ontario, containing about *twenty-five or thirty acres*.”

This petition was favourably answered on the 3rd of June, 1796, and on the 24th of August, 1796, letters patent were issued, granting to the Honorable David William Smith,

his heirs and assigns, "a certain parcel of land in the township of Newark, containing by admeasurement thirty-five acres, be the same more or less, which said thirty-five acres of land are butted and bounded as follows, viz:—Beginning at the north-west angle of the military reserve, near Mississagua Point, on the bank of lake Ontario, thence south 10 chains, then south 55° east 13 chains, thence south 35° west 8 chains and 32 links, thence north 55° west 40 chains, thence south 55° west 7 chains and 32 links, thence south 35° west 15 chains, then westerly, on the west bank of a small creek, to the lake Ontario, then following the courses of the lake easterly to the place of beginning."

In this patent a reservation was made for a protestant clergy of 5 acres in lot 126, in the township of Newark.

The government, a few years ago, advertised the lots 84, 85, and 86 for sale, as town lots in the town of Niagara, (formerly called Newark,) having been reserved as clergy reserves, in respect of other town lots in the town, of which grants had been made by the crown. The present lessor of the plaintiff became the purchaser of these lots at the government sale, and claimed them in this action, under that title.

The defendant maintained that they were part of the land granted by the patent referred to in 1796, to the Honorable D. W. Smith, and it was admitted that whatever lands were included in that patent came to the defendant by purchase from Mr. Smith.

The question was, whether these lots were or were not embraced in Mr. Smith's patent. This, it was agreed at the trial, should be submitted to the opinion of this court, and a verdict entered accordingly.

It was proved that these three lots, 84, 85, and 86, had been always up to time of the trial lying as waste land, unoccupied and unimproved, and that the tract understood to be embraced in Mr. Smith's patent had always been allowed to lie unoccupied.

It will be seen that the description in the patent takes no notice of the town of Niagara, (or Newark) nor of any street in it; but, for all that appeared, might be taken to

describe a tract altogether independent of the town, and indeed such the tract should have been, for the patent only professed to grant land in the "township" of Newark (now called Niagara), and to grant 35 acres more or less. But laying down a tract according to the courses and distances given in the patent, which were all expressed absolutely, and without any qualification of "more or less," or any reference to the town, or any street in it, the description would embrace about 70 acres [instead of 35, and would cover about two-thirds of the width of Queen Street, the principal street in the town of Niagara, along a distance of 40 chains, as laid down in the public plan or survey of the town of Newark (now called Niagara), made long before Mr. Smith's patent was issued, and which map was then in the office under Mr. Smith's charge, as surveyor general, and was the regular official plan, according to which the crown grants were made. And the patent according to the lines and courses mentioned in it, would cut off also, and include in the patent, six entire town lots, and part of six others, at least of what are laid down in the old office plan of the town of Newark as town lots. On this plan lots 83, 84, 85, and 86 were represented as forming four town lots of the town, of the same size as the other lots, having their north front on Queen street, and fronting to the north and west on two other streets of the town. A dotted line appeared on this official map of Niagara, proved by a clerk from the surveyor general's office, to have been added by the late Mr. Chewett, who was for many years senior surveyor and draftsman in the department, which line shewed to what extent the patent to Mr. Smith would interfere with the town, cutting off, it appeared, the whole of the lots 84 and 85, which the lessor of the plaintiff claimed in this action, and a part of 86. It would cut off also not only two-thirds of the breadth of Queen street for a distance of 40 chains, but would take in the whole street along the north front of town lot 83 and part of 85, and would cut off part of three other streets laid down in the town plan.

The town lots contain about one acre each. It was proved that the defendant, in making a sale of land as part

of Mr. Smith's tract, pointed out to the vendee Queen street as his boundary, not claiming to interfere with it; also, that on the 11th of December, 1850, he wrote to the public agent for crown lands in such terms as shewed that he considered these lots, 84, 85, and 86, as adjoining his lands and forming no part of them, and also that he bid for them at the same public sale at which the lessor of the plaintiff purchased. It was also proved that, upon a transaction which took place between the defendant and the government many years ago, the defendant surrendered to the ordnance department forty acres, as being held by him under this patent, and received other lands in exchange for them, which shews how large an overplus the lines and courses which Mr. Smith caused to be inserted in the patent to himself would embrace beyond the thirty-five acres mentioned in that patent, and this without interfering with the lots now claimed by the lessor of the plaintiff under his late purchase from the crown, and without indeed interfering with the original town plot to any extent.

A clerk from the surveyor general's office was examined as a witness at the trial, and he swore that the plan he produced was used in the office as the original map of the town of Newark or Niagara (the name having been changed after the patent issued), on which plan town lots 83, 84, 85, and 86, were exhibited as forming a square block in the town, at the western end of Queen street, and on its southern side, having streets of the town on each side of the square block, which, like the other blocks in the town, is composed of four town lots, of one acre each. Each lot in this block had the letter R written across it on the plan, which was explained to mean "Reserve," and across the whole block is written the note "Reserved, if necessary, to complete this town, which was organized on the 21st of June, 1791, in the proportion of one-seventh," which was explained to mean that those lots were reserved as clergy reserves, and to be specified in patents as such, if necessary to make up the proportion of one-seventh for clergy reserves in respect to the lands granted as town lots.

And upon the trial three crown patents were produced, bearing date in 1796, and before the date of Mr. Smith's

patent, in each of which patents is contained this reservation,—“Now know ye that *in the said town of Newark* we have directed an allotment or appropriation of land, being in proportion of one to seven of the land hereby granted to the said (grantee), to be made in a square, containing four acres, comprehending lots Nos. 83, 84, 85, and 86, lying at the north-west angle of the town, and west of Mississagua Point, and containing,” &c., (stating the quantity of land so reserved).

There was also produced a patent, made on the 6th of July 1797, being the year after Mr. Smith's patent, in which there is a reservation for a Protestant clergy made in lots 83, 84, 85, and 86, not stating whether these lots were in the town or township, but doubtless referring to the same lots, and thus treating them as lands which remained at the disposal of the government, and which they were then at liberty to reserve for the clergy, though this was nearly a year after Mr. Smith had received his patent, and it is to be considered that it was his duty, as surveyor general at that time, to furnish the descriptions for all these patents.

Mr. Jones, a clerk from the surveyor general's office, proved that these lots, 83, 84, 85, and 86, had always been treated and considered by the government as being a part of the town of Niagara as much as any other in the town, and as such had been lately advertised and sold as clergy reserve lots in the *town of Niagara*. It was also explained that if the patent to Mr. Smith could not extend so as to interfere with Queen-street, the principal street in the town, then the line running southerly 7 chains 32 links from the western end of the 40 chains' distance mentioned in the patent would not reach across the whole square now in question, but would leave some part of the southern end of lot 85 not embraced in the patent, even if it could otherwise take in those lots, and this the plaintiff contended would of itself entitle him to a verdict.

Another witness (Mr. Miller) was examined, who swore that he had lived in Niagara since 1802: that he had always understood the limits of the town to be as laid down in the public plan produced: that he had been deputy

registrar for ten years, and had always known the lots now in question, and the other lots, numbered in the plan as town lots, as being part of the town.

It was shewn that, by a public notice of the government these lots, together with eight other lots, were advertised for sale as clergy reserve lots in the town of Niagara.

On this evidence it was contended on the part of the plaintiff that Mr. Smith's patent, granting only land in the *township*, could not cover any part of the town.

And, 2ndly, that even if it could otherwise embrace the lots in question laid down as part of the town, yet that they having been taken into specification (as it is called) as clergy reserves, in patents issued before this patent to Mr. Smith, such parts as were so reserved solemnly under the great seal became set apart, under the British statute 31 Geo. III. ch. 31, for the support of the clergy, and could not be granted afterwards by the government, or in any manner absolutely disposed of, until the late imperial statutes were passed, which have authorized the sale of clergy reserves, and under which the crown had disposed of these lots to the lessor of the plaintiff.

These points were agreed to be submitted to the opinion of this court, and a verdict was taken at the trial, by consent, for the plaintiff.

Vankoughnet, Q. C., for the plaintiff. *Cameron*, Q. C., for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

As the plaintiff sues in this action for the whole of lots 84, 85, and 86, in the town of Niagara, and the defendant claims title only to the thirty-five acres described in the patent to Mr. Smith,—and admits the plaintiff's right to part of the three town lots above named, under his purchase from the government, which is not covered by this patent (if there be any such part),—it is clear that the plaintiff is entitled to a verdict, because it was proved on the trial, and seems quite certain, that there is a portion of town lot 86 which the patent does not embrace, giving the fullest effect to the description, by carrying all the lines out to the distances expressed. But, in order to prevent further litigation,

both parties desire to know the opinion of the court upon the point whether this grant to Mr. Smith, under which the present defendant claims, can be allowed to interfere with any parts of the lots 84, 85, and 86 ; or whether, notwithstanding the issuing of that patent, the title to these lots, as forming part of the town of Niagara, did not still continue in the crown, until they were sold to the present lessor of the plaintiff as part of the lands that had been reserved for a protestant clergy.

We are of opinion that the patent to Mr. Smith (afterwards Sir David Smith), cannot be held to have vested in him any land that did not at that time form part of the township of Newark, distinct from the town. It is clear that it was not intended to encroach upon what was then known as the town. Mr. Smith had only applied to the government to grant or confirm to him something which his father had asked for, and which he describes as a small farm "*adjoining the town of Newark.*" He does not pretend that his father was to have had part of the town for a farm ; and in this same petition he declares that he has abandoned a portion of what his father had occupied because it fell within the military reservation, and he asked only for a grant of what land there might be lying between the military reservation and the town, which he said would contain about twenty-five or thirty acres.

Mr. Smith was at that time Surveyor-General, and as such was in possession of the most authentic information as to the limits of the town and the extent of land between that and the military reservation. It rested with him to give the government precise information upon that point. The town had been laid out long before that, and it is fair to assume that he was well aware of its limits, and did not speak without knowledge of the fact when he described the intervening tract as containing about twenty-five or thirty acres. What is now contended for, it seems, would have the effect of making the patent made out in pursuance of this petition (and for which patent it was the duty of Mr. Smith himself, as Surveyor-General, to furnish the description) covers nearly, if not quite, seventy acres ; and it

further appears that the defendant, who purchased from Mr. Smith his interest under his patent, has actually had his title to 40 acres recognized already, which is considerably more than Mr. Smith represented himself to be applying for. What his assignee now seeks to hold against the vendee of the crown, by laying claim to what appears to have been always understood to form part of the town, would be so much in addition to these 40 acres. It need hardly be said that, under such circumstances, there is the least possible claim to be urged by the party claiming under this patent to anything which the description in the patent does not strictly and inevitably cover.

It is remarkable that, the government having merely assented to the petition for a grant of land *between the military reserve and the town*," the description which was framed for carrying their order into effect should have forborne all mention of the land being intended to be the tract between the military reserve *and the town*, and should make no more reference to the town than if no such town existed ; and the patent goes beyond the petition in calling the contents of the tract thirty-five acres, more or less, instead of from twenty-five to thirty. It begins at the north-west angle of the military reserve, which no doubt was a fixed and known point, and then lays down courses and distances as if they were to be carried out absolutely and without any regard to the boundaries of the town ; and under this patent a claim is set up which, if it can be supported, would give to Mr. Smith and his assignee seventy acres instead of thirty-five, and would cut off a considerable portion of the town, including parts of several streets. We think nothing passed under this patent which at the time formed part of the town ; because the patent grants thirty-five acres, more or less, in the *township* of Newark, and we know that the town and township of Newark or Niagara are distinct localities, and were so treated by the legislature and by the government, though the town may have formed part of the township—that is, may have been taken out of it. The 28th clause of the statute of 1798, for the division of the province, shews this ; for it provides that the town and

township of Newark shall be thenceforth declared and called the town and township of Niagara, respectively; and the patents which were put in upon the trial, of earlier dates than that to Mr. Smith, shew that the town and township were treated by the government as distinct divisions of territory. Then, this being so, the principal feature or term in the description is, that the land granted is "in the township of Newark"—in other words, out of the town; and that so far controls the description, that the latter, being subordinate to this principal feature of the grant, cannot have the effect of making land pass by the patent, which, properly speaking, is not land in the township but in the town. The case in this court of *Doe ex dem. Stuart v. Forsyth*, 1 U. C. R. 324, was decided on this principle, and we have acted on it in other cases: it is in accordance with what is to be found in English books of the highest authority. If this description had commenced by granting all that parcel or tract of land embraced within the lines or limits expressed in the patent, and, after laying down a certain tract capable of being traced on the ground, had added by way of further description the words "being land in the township of Newark;" whereas the land thus described formed in truth part of the town, then the tract itself, as laid down on the ground, and described by metes and bounds, would have been the principal feature or term of the grant, and the other would have been mere matter of description, and of erroneous description, in calling the land so granted part of the township instead of part of the town. But here the patent begins by announcing a grant of land in the township, and then in proceeding to describe it, includes land in the town, which must be a false description of that which had been granted. It is the same thing in effect as if the crown should make a patent to A. of lot 1, in the first concession of a township, and then proceed to describe it by such courses and distances as would embrace a part of lot 2, or would cross into the second concession; in which case the lot intended to be granted would pass, and the incorrect description would be discarded. In this case, from the peculiar terms of the patent

and the nature of the grant intended to be made, a difficulty may be found to arise in defining the limitation of the grant, when it is determined that none of the lines can consistently with the patent be carried over the boundary of the town; but we have nothing now to do with the question whether the patent grants any particular tract with requisite certainty. It is only necessary, as between these parties, to determine whether any part of the three town lots in question were vested in Mr. Smith by that patent, and I have already said that we think they were not. If the Surveyor General had made his patent correspond with his petition, and had expressed that what was intended to be granted to him was only the land between the reserve and the town, and bounded on the south and west by the small creek and by the lake, then it would have been clear enough what was meant, and the erroneous lines could have created no embarrassment.

It is very material also, as was contended on the trial, that the lots now claimed by the defendant, as being included in Mr. Smith's patent, had not only been laid down on the office map of Niagara as part of the town of Niagara so early as 1792, four years before this patent issued, but they had been actually reserved by the government as clergy reserves under the British statute 31 Geo. III. chap. 31, and were so marked on the plan in the surveyor general's office the very plan, as we are at liberty to assume, from which the description in question must have been framed. And it was further shewn that in two patents which had been issued before that one to Mr. Smith was made, parts of these same town lots, 84, 85, and 86, were specified as the lands reserved for the clergy, in respect of the land granted by those patents.

This is not only a declaration under the great seal, in accordance with the office plan, that the lots at that time formed part of the town, but the effect of the reservation being thus made in these patents was to set them apart conclusively, as against the crown, for clergy reserves, and to make them unalienable thenceforward by the mere act of the executive government. The 36th and 37th clauses

of that statute would be rendered nugatory, if after any particular lot had been thus set apart by patent, as being the proportion of clergy reserves which it was indispensable to the validity of the grant should be specified in the patent, it would be competent to the government to grant the same to an individual, as if it were notwithstanding vacant and grantable. It would be indirectly making the patent itself void; or, if the alienation could be effectual, it would, in effect, amount *pro tanto* to a repeal of the British statute. It has been always well understood that until the imperial parliament some years ago made provision for selling the clergy reserves and applying the proceeds to religious purposes, no land which had thus been set apart, and specified in letters patent as specifically reserved for the clergy, could be treated as land grantable in fee to individuals; and in justice to Mr. Smith it ought to be assumed that he could never have imagined, or intended, that he was including in his description of lands to be granted to himself the very lots which he must well have known had been by the solemn act of the government, in which he had himself participated, set apart for the clergy. This is an objection to the defendant's title, independent of the mere fact of these lots forming part of the town, and it appears to us to be insurmountable.

Our opinion is, that no land can be held to have passed under the patent which formed a part of the town plot, and we think it is evident that there is no appearance even of hardship in this decision.

Postea to the plaintiff. (a)

(a) See Doe dem. Gildersleeve v. Kennedy, 5 U. C. R. 402.

DOE STEVENS ET AL. V. CLEMENT.

Statute passed reversing attainder except as to lands already forfeited and sold—Effect of, on proof required from parties claiming under the traitor—Mere date of will being thirty years old, not sufficient to dispense with proof—13 & 14 Vic. ch. 63.

A statute was passed reversing the attainder of A. S., and taking away the forfeiture wrought thereby, so far as it might affect such portions of his estate as had not been already declared forfeited, and been sold under authority of law, and vesting such estate in those who could claim it if he had not been attainted; provided always, that nothing in the act contained should affect any property sold or conveyed by the Commissioners of Forfeited Estates, or any public officer acting for the crown in that behalf, but that such property should remain as if the act had not been passed. In the preamble it was recited that part of the estate had been taken upon inquisition, and seized by the Crown.

Held, that the plaintiffs claiming as devisees of A. S. must shew, as part of their case in the first instance, that the lands claimed were not part of those forfeited and sold.

The mere fact of the date of a will being thirty years old, is not sufficient, under all circumstances, to prove that that is the real age of the writing, even if it comes from the proper custody; but some proof must be given of a concurrent possession of the property consistent with it, or of the existence of the will for thirty years.

Ejectment for four hundred and fifty acres in Whitby.

On the 10th of July, 1801, the crown granted this land by patent to Aaron Stevens. He was convicted of high treason, committed during the war with the United States of America, in 1814, and was executed.

The statute of Upper Canada, 59 Geo. III. ch. 12, made provision for vesting in commissioners all such estates of traitors as had been or might thereafter be attainted by inquisition as forfeited to his Majesty, and for satisfying all debts and claims thereupon, and appropriating the remainder of what this might produce to certain public purposes.

In 1851, an act was passed (14 & 15 Vic. ch. 170) which recites that Aaron Stevens had been lawfully convicted and attainted of high treason, and had suffered capital punishment; whereby his real property had become forfeited, and had been in part taken upon inquisition found in that behalf and seized into the hands of the crown; that a portion of his estates was not found upon inquisition, or declared forfeited by reason of his attainder, or seized by the crown; that Her Majesty had been pleased to signify her pleasure that his attainder might be reversed, the corruption of blood consequent thereon taken away, and no further forfeiture enforced against such of his estates as had not already been forfeited and disposed of; and it was thereby enacted,

that the attainder of Aaron Stevens should be reversed; and the corruption of blood and forfeiture wrought by the said attainder are thereby avoided and taken away, "*so far as the same shall or may in anywise affect such portions of the estate of him the said Stevens, as have not already been declared forfeited, and been sold under authority of law; and such portions of the estate of the said Stevens, not already forfeited and sold as aforesaid,*" are thereby vested in the same persons or parties, whether claiming by will or otherwise, in the same manner and with the same and no other effect or consequence as to the rights of third parties, as if he had died without being so attainted: "provided always, nevertheless," the act says, "that nothing herein contained shall extend or be construed to extend to or affect any goods or chattels, lands, or tenements, actually sold or conveyed by the said Commissioners of Forfeited Estates under the said act or otherwise, or by any public officer or minister of justice acting on behalf of the crown in that behalf; but all such goods and chattels, lands, and tenements, shall belong to the same parties, and be dealt with in all respects as if this act had not been passed."

The last clause enacts that the act and the reversal of attainder referred to, shall be construed and taken in the most large and beneficial sense and manner in favour of the heirs and assignees of the said Aaron Stevens.

This action of ejectment was brought on the several demises of a great number of persons, children and grandchildren of Aaron Stevens, and the husbands of some of them; all claiming an interest under a will of Aaron Stevens, alleged to have been made on the 18th of September, 1813, whereby he devised to his sons, Nicholas, Adam Chrysler, William, Joseph, Samuel, Daniel, and Alexander, and to his daughters, Margaret, Catharine, Mary Anne, Elizabeth, and one "unnamed" admitted to be Jane, their heirs and assigns forever, all his real and personal property, to be equally divided among them: and directed that if any of them should die before his decease, then his or her share to be equally divided among the survivors, after just and lawful debts are paid.

He appointed his wife and three other persons to be

executors of his will, one of whom was John Chrysler, his wife's brother.

At the trial, before Draper, J., at Toronto, the will was produced, and one of the sons of Stevens swore that, about eighteen years ago, John Chrysler, who had since died, gave it to him, telling him his father had left it with him; that he gave the will to a brother, who kept it till he died, when it got into the possession of another brother; and the latter swore that he had kept it until the time of the trial. There were three subscribing witnesses, who had all died, and the proof of the signature of any of them was very defective: indeed no witness gave an opinion as to any of the signatures but one, that of the subscribing witness John Daly; and it was on account of the unsatisfactory nature of his evidence that it was attempted to rely on the will as a document proving itself. The learned judge, however, thought that there was evidence sufficient, if believed, to prove the signature of the subscribing witness Daly.

It was sworn that Nicholas Stevens was the eldest son and heir of Aaron Stevens, though some doubts were thrown upon his legitimacy, as being born before the marriage of his parents; but on that point there was no precise testimony.

The defendant claimed under a deed made to him by this Nicholas Stevens, of the land now in question, on the 21st of November, 1831, in fee, registered on the 2nd of December, 1831, which was produced and proved.

The defendant's counsel contended that this deed, being registered, must be allowed to prevail against the will, which had not been registered; that such is the effect of the late Registry Act (13 & 14 Vic. ch. 63), although the title had not been before a registered title.

And he relied upon the statute, which was put in evidence, reversing the attainder of Aaron Stevens, as making it indispensable, before any persons could make title as devisees under his will, that they should shew that the estate which they claimed had not been forfeited under his attainder and sold; for that the act, by its very terms, is only made to affect such unsold lands.

The learned judge overruled the objection to the devisees' title grounded on the non-registry of the will; but, with consent of the parties, directed a verdict for the defendant, subject to the opinion of the court on the effect of the statute, who were either to direct a general verdict for the plaintiffs, or a verdict for the plaintiffs upon such demise or demises as they should think right on the evidence, in case of the lessor of the plaintiffs, or any of them, being found entitled to recover.

Bell obtained a rule *nisi* to set aside the verdict for the defendant, and enter a verdict for the plaintiffs generally, or on such demises as the court might think right on the evidence; or for a new trial on affidavits. He cited *Simpson v. Ready*, 12 M. & W. 736; *The Mayor of Salford v. Ackers*, 16 M. & W. 85.

Cameron, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The lessors of the plaintiff made title under the will, which it was objected was not legally proved. The learned judge thought there was some evidence of its execution to go to the jury, but by consent the verdict was taken for the defendant at the trial, subject to our opinion. We cannot say whether the jury believed the evidence respecting the will, nor whether it satisfied them that the will was duly executed. We do not find that it was so proved as to leave no question for the jury on that point. Indeed it can hardly be said that there was evidence given sufficient to convince the jury of the handwriting of any one of the three witnesses to the will, though, if the jury had pronounced upon it, such as it was, we might not have felt it necessary to interfere.

It was further objected that the other two subscribing witnesses were not accounted for, and that is true. When the will is thirty years old, that is not necessary, for the presumption is, that they are dead; but I doubt whether the mere fact of the date being thirty years old is to be taken as proof that that is the real age of the writing under all circumstances, for if it were, then it would be easy to commit successful forgeries; the chief difficulty would be got rid of by merely ante-dating the instrument.

There is no proof here of any one having seen this will more than eighteen years ago. And, under such circumstances, admitting that the will came from the proper custody, I cannot say that, as a matter of course, it proved itself, there being no concurrent possession of the property for the thirty years consistent with it; nor any proof of its existence going further back than eighteen years.

But on the other, and main ground in the case, we concur in the opinion expressed at *Nisi Prius*—that the express words of the statute 14 & 15 Vic. ch. 170, make it necessary that the plaintiffs, claiming as devisees of the attainted traitor, should shew as part of their case in the first instance that the lands they are claiming form no part of his real estate that has been forfeited and sold; that they have not been returned by the commissioners of forfeited estates as having been found by inquisition to have been forfeited to His Majesty, and sold as such by the commissioners.

Though this is negative evidence, it is a negative admitting of the plainest and most easy proof, because the Forfeited Estates Act provided for making and preserving records of all estates that had been so dealt with; and this is no proviso or exception occurring either in the same or a subsequent clause to that which relieves from the forfeiture, but the relief itself is only afforded *so far as regards* estates not forfeited and sold; therefore, in order to bring the case within the act, it is necessary to shew that the estate now in question is such an estate.

No evidence whatever was offered on that point, and we think therefore the verdict was rightly entered for the defendant.

Rule discharged.

THE CANADA COMPANY V. HOWARD, TREASURER OF THE
UNITED COUNTIES OF YORK, ONTARIO, AND PEEL.

Non-resident proprietors, how assessed for statute labour—13 & 14 Vic. ch. 67.

Where a non-resident owns several lots of land in the same township or county, he is chargeable on account of statute labour with the rate of commutation estimated with reference to the value of each lot separately, and cannot claim to have them rated according to their aggregate value.

In this case *Cameron*, Q. C., obtained a rule nisi, ordering the treasurer to shew cause why a mandamus should

not issue, commanding him to receive from the Canada Company 12*l.* 7*s.* 6*d.*, being the amount of commutation for statute labour tax on the lands of the Canada Company in these united counties.

The application was founded on an affidavit of the commissioner of the Canada Company, stating that the treasurer had demanded from him 70*l.* 11*s.* 2½*d.* for taxes on the lands of the Company in these three united counties: that this sum included 35*l.* 5*s.* 9*d.* charged against the Company's lands in the several townships of these counties for commutation of statute labour: that this commutation was charged on the value of each separate lot in the respective townships; instead of being charged on the aggregate value of all the lands of the Company in each of the several townships; and that the excess of taxation created thereby amounts to 22*l.* 18*s.* 3*d.*: that the treasurer was well aware that the land so charged belonged to the Canada Company, and made the charge against the Company in respect of them: that he had refused to receive the amount that would be due if charged upon the aggregate value of the lands of the Company in each township, and insisted upon the commutation tax being paid upon the value of each lot or parcel of land as valued separately.

A similar rule, on the same ground, had been granted to shew cause why a mandamus should not issue to the treasurer of the county of Kent, in order to correct an alleged overcharge of the same kind.

Vankoughnet, Q. C., and *C. Gamble*, shewed cause. The question brought up by these applications was, whether, under the Assessment Act, 13 & 14 Vic. ch. 67, the lands of a non-resident owning several lots or parcels of land in a township, are necessarily chargeable on account of statute labour with the rate of commutation estimated with reference to the value of each lot or parcel of land separately, as they would be in the case of a resident or non-resident proprietor owning but one lot of land in the township; or whether a non-resident proprietor having declared himself to be the owner, or being otherwise known by the treasurer of the county to be the owner of several

lots in any one township, can insist upon their being rated for statute labour, according to the scale laid down in the 22nd clause of the statute, upon an estimate of their aggregate value.

ROBINSON, C. J., delivered the judgment of the court.

The 7th, 8th, 9th, 17th, 20th, 22nd, 23rd, and 32nd clauses are those which bear upon this question, and having considered their language, and examined all other parts of the statute, we think it is clear—whatever may be conjectured to have been the intention of the legislature—that the scale of charge laid down in the 22nd clause, according to which the assessed resident inhabitants of a township are to be rated to a certain number of days' statute labour, increasing with the amount of their assessed property, but with the ratio of increase diminishing as the scale of value increases, can only be applied to the cases of parties assessed upon the assessment rolls; in other words, to resident proprietors.

In regard to non-resident owners of lands in any township, the act admits of no other course for rating them in respect of statute labour than by following out the provisions of the 32nd clause, which makes the tax in their case a charge against the several parcels of land which they may own, and not against themselves in respect of their lands. Then, each distinct lot or parcel of land being required in such cases to be rated by itself according to its value, and without regard to its owner, whose name cannot appear on the list, we see no authority for making an aggregate estimate of their value, in consequence of its being shewn, apart from the assessment roll, that they do in fact all belong to one proprietor. They must all be treated, we think, as if they belonged to different proprietors, and must contribute according to the valuation of each parcel. The effect of this will be, that if A., living in the county of York, owns one lot of land in each of six several townships of the county of Middlesex, or six lots in one township of that county, his lots will in either case be rated for statute labour according to their valuation; and the act bears no more hardly upon him in the one case than in the other. Where any lot or parcel of land of a non-resident proprietor

in a certain township is valued at any of the larger sums mentioned in the twenty second-clause, that single property will have the benefit of the graduated scale given in that clause, because it is only according to that scale that the charge against the lot can be made, and so the proprietor in such a case gets in effect the benefit of the reduced rate of charge in proportion to the value of the property.

But we see no means, without some officer stepping out of his line of duty and disregarding the provisions of the act, by which the non-resident proprietor can obtain the same benefit in effect, in regard to several lots of land which he may own in the same township. The twenty-third and thirty-second clauses taken together, in connection with preceding clauses of the act, seem to preclude the township or county officers from paying any regard to the consideration of the same absent party having to pay the rate in respect to several lots of land, and on that account altering the rate at which *each lot* is chargeable under the thirty-second clause; the intention of the statute being clear that in regard to the lands of non-residents the charge is to be made on the roll against the land itself, and not against the proprietor, of whom no mention is to be made or notice taken on the assessment roll. In our opinion, we must discharge this rule with costs.

Inconveniences may be suggested that will arise from the statute being construed, as we think it must be, looking at the plain signification of its language—one was stated indeed by one of my brothers during the argument. A proprietor of land in one municipality may reside in another, and finding his land likely to be saleable in village lots, may divide fifty or one hundred acres accordingly into small lots; if each of these must be rated separately, as if they belonged to different proprietors, the amount of statute labour for which he would be rated would be monstrous, and so it might be, and the act in this respect might be found oppressive—but that will not give us power to deny to the statute its plain operation and effect. The legislature must be looked to for correcting any injudicious provisions

Rule discharged.

DOE DEM STATA v. SMITH ET AL.

DOE DEM SUMMERS v. McDONELL.

Sale of lands for taxes—Lands returned in June, 1820, liable for that year—
 59 Geo. III. ch. 7 ; 6 Geo. IV. ch. 7 ; 9 Geo. IV. ch. 3.

Under 59 Geo. III. ch. 7, lands returned in the surveyor general's schedule in June, 1820, were liable to have taxes charged against them on the 1st of July following, which taxes for the first year were to be then assessed for 1820, so that, if not paid, there would be eight years' taxes in arrear on the first of January, 1828.

Such lands having been sold under a warrant which described the taxes on them as being in arrear from *the first of July, 1820, to the first of July, 1828*, the sale was upheld: for eight years' taxes being really due, the mistake in the time of commencement was unimportant, and could not vitiate the warrant.

At the trial, before McLean, J., at Cornwall, the plaintiff's title *prima facie* was not objected to in either case; but the defendants claimed the land under a purchase made at sheriff's sale for taxes.

In Stata's case a patent had issued for the land in December, 1802, to the plaintiff's ancestor.

On the 24th of June the surveyor general returned the land in his schedule as described; and at the Quarter Sessions, on the 17th of August, 1829, the treasurer of the Eastern District returned this, with other lands, as being in arrear for taxes eight years up to the 1st of July, 1828, and therefore liable to sale. In September, 1829, warrants to sell were issued by the clerk of the peace, and on the 6th of July, 1830, the land in question was sold to Simon Frazer, and conveyed to him in January, 1831. The defendants claimed by purchase from a person who afterwards bought from Frazer.

No other objection was taken to the defendants' title than this, that the arrear of taxes for which the land was sold was claimed as being in arrear from the *1st of July, 1820, to the 1st of July, 1828*, whereas under the assessment law, of 1819 the fiscal year begins on the 1st of January in each year; and the writ should have been for eight years' taxes, ending on the 1st of January, 1829, commencing the 1st of January, 1821, for that on the 1st of July, 1828, only seven and a half years' taxes were due, wherefore the land was returned for sale before there were eight years' taxes in arrear, which the law does not authorize.

The same question was brought up in the case of Doe dem. Summers v. McDonell.

A verdict was given for the defendant in each case, with leave reserved to the plaintiff to move to enter a verdict in his favour.

Vankoughnet, Q. C., obtained a rule nisi accordingly, and in the alternative for a new trial on the law and evidence, and for misdirection.

McDonald, Q. C., shewed cause.

ROBINSON, C.J.—We are all of opinion that there is no good ground for the exception. Under the 13th clause of the statute 59 Geo. III. ch. 7, the lands returned in the surveyor general's schedule in June, 1820, would on the 1st of July, 1820, become chargeable with that year's rates, and therefore in July, 1828, would be eight years in arrear, as these were assumed to be—no taxes having been paid in the meantime. The statute 9 Geo. IV. ch. 3, sec. 9, extending the time for making the treasurer's return to July, 1829, makes it quite clear that this was done as an act of indulgence to the parties; and when this clause is considered in connection with the 6th clause of 6 Geo. IV. ch. 7, we cannot fail to see a plain legislative declaration that, according to the intention and effect of the first act 59 Geo. III. ch. 7, eight years' taxes would be due on the 1st of July, 1828, on all lands included in the surveyor general's first return made under the last mentioned statute.

So far as we have observed, in the many cases brought before us of titles acquired under sales for taxes, the law was so construed by the proper authorities in all the districts, and we think there can be no question that in that respect the law has been rightly acted upon. The 6th clause of 6 Geo. IV. ch. 7, must govern the question, and it shews plainly that, although the fiscal year may have begun on the first of January, yet the taxes for that year were not to attach in respect to absentee lands before the 1st of July, because, as regarded them, certain facts were to be ascertained and formalities required, for which there was no occasion in the case of resident proprietors; but to hold that on that account there was to be no charge made

for taxes against such lands in respect to any time before the 1st of *January*, 1821, would be contrary to the terms and evident intention of the 6th clause of 6 Geo. IV. If the legislature meant that, the provision contained in the ninth clause of 9 Geo. IV. ch. 3, would have been unnecessary.

DRAPER, J.—Confining my attention strictly to the provisions of this act (59 Geo. III. ch. 7), I certainly should arrive at the conclusion that the fiscal year for rates, taxes, or assessments, made or imposed under its authority, commences in *January*, and ends in *December* in each year, or at all events, that it commences on the first *Monday* in *January*, and ends accordingly; and I do not see any sound reason for holding that the fiscal year for lands unoccupied and not on the assessment roll, but included in the surveyor general's schedule, should begin and end at a different period from that for lands unoccupied and on the assessment roll.

I do not think it by any means necessarily follows from the language of the act, that the fiscal year for lands only appearing in the surveyor general's schedule should begin on the 1st day of *July*; and, notwithstanding the words, "from the time they are returned in the said schedule," I am still less inclined to think that the fiscal year for such lands commences on the date of such return, which may be, and probably is, different for different districts; and also, probably, is different in different years. Taking the sentence together, that the lands described in the schedule as granted or let to lease "shall, from the time they are returned in the said schedule, be assessed and charged to the payment of the rates or taxes imposed by this act in the respective districts in which they are situated, and not elsewhere." I rather draw the inference, that from the time of the return they shall be charged with the taxes for the current year, though a large part of that year was antecedent to the date of the schedule, just as every occupant found in possession when the assessor goes round, is assessed, not from the date of the assessment actually made, nor from the day on which he entered into possession,

but from the commencement of the year for which the assessment is made. The "rates or taxes imposed by this act," are for a year current when the schedule is returned by the surveyor general; and it does not appear to me a forced construction of the language to give it a retrospective action to that extent. Looking no farther than the act, it appears to me the sound construction.

The very next statute passed (59 Geo. III. ch. 8), appears to me to confirm this opinion. By its provisions (sec. 3), every lot or parcel of land subject to be rated and assessed, but which is not included in the assessment roll, is, from and after the first Monday in March, 1825, rated at one-eighth of a penny per acre for the improvement of the public highways.

By section 4 the treasurer is authorized to receive these rates; and there is a similar power of distraining for them at a future period "if no distress can be found at the time such rates are payable," as is contained in section 13 of the preceding act. Section 5 is a repetition of section 15 of the former act; and section 7 provides that *in the account* to be kept under sec. 14 of the preceding act, the treasurer shall charge or credit each lot with the road tax and payments thereof, as well as those accruing under the former act, thus blending into one the accounts of the two taxes.

I think it impossible to hold that a separate fiscal year, commencing on the first Monday in March, can be deemed created for the road tax on lands not on the assessment roll. If it were, then such lands would not be known under the former act as liable to rates and assessments until the surveyor general's schedule was returned: the road tax would either commence from the 1st of March next, before the time of the lands being returned in that schedule, or from the first of March after—in either case making two distinct times of the commencement of the fiscal year for the assessments and for the road tax, whereas I think the legislature intended only one fiscal year for all purposes, and that its commencement and conclusion is governed by the time for assessing ratable property on the rolls, and imposing rates and taxes according to the provisions of ch. 7, as to parties resident in the various localities.

It is not until we look at 6 Geo. IV. ch. 7, that any difficulty as to the commencement of the fiscal year in respect to taxes of any kind on land not on the assessment roll, but in the surveyor general's schedule, appears; and on looking at the 6th section, it must be read as altered by the 9th Geo. IV. ch. 3, sec. 9, and then it will be in substance as follows: that the treasurer shall, at or before the Court of General Quarter Sessions which shall ensue next after the 1st of July, 1829, present to the justices an account of all lands on which the assessments, rates, or taxes, imposed by the several acts, or any part thereof, shall have been in arrear for the space of eight years, specifying the land by lot, &c., as it appears in the schedule furnished by the surveyor general, and specifying the amount due for assessments thereon, and shall make a like return at the same court in each succeeding year.

I do not see that any difference as to the commencement of the fiscal year is made by this enactment, which is the only one in either of the two acts last referred to that affects the question.

When the time arrived (1st of July, 1829), the treasurers might, so far as I can see, have made their returns up to the end of the last fiscal year,—viz. up to the 31st of December, 1828. The words, “shall have been in arrear for the space of eight years,” would no doubt exclude from such return all lands upon which taxes had not been in arrear as much as eight years, but not lands upon which taxes had been in arrear more than eight years—*i. e.* nine, counting from the beginning of the fiscal year 1820.

But, if my view be correct, the taxes for which this lot was sold accrued due at the end of the fiscal year, 1827; and the error in the treasurer's account, that the eight years' taxes accrued due on the 1st of July, 1828, would be, I think, unimportant. It might be rejected, as the fact would be that the eight years' taxes had accrued earlier. Still less should an error of this description affect the sale when, before the date of making up the account, another year had become in arrear. The substance of the treasurer's account is that eight years' taxes are in arrear. The law does not

require in terms that the day on which the eight years expired should be stated. This is confirmed by the form of the writ to sell given in the schedule to the 6th Geo. IV., which recites that by the account rendered by the treasurer it appears that the assessments, or some part thereof, which are imposed upon lands by the several statutes of this province, have been suffered to remain in arrear beyond the space of eight years upon the lots or parcels of land hereinafter mentioned; and that the said lots or parcels of land stand respectively charged with the sums herein set forth,—that is to say,” (setting out the lots and the “sums charged against the same in the treasurer’s accounts, so remaining in arrear *up to the expiration of the last year before such account was rendered.*”)

Upon the whole I think the rule should be discharged.

BURNS, J.—The first question, as it appears to me, is to ascertain what the construction of the act is as to the computation of time for commencement of the taxes on lands not returned to the assessors, and not appearing on the assessment roll. In the case of the Eastern district it seems the treasurer adopted the 1st of July, 1820, as the time from which the taxes were to commence upon such lands as were liable to the rates, and which had not been returned on the assessment rolls; and the justices of the district took the same view, when they ordered and directed warrants for the sale of such lands after the expiration of eight years. It is now contended before us that lands returned on or before the 1st July, 1820, and on and before the 1st July in every year thereafter, are not liable to be rated or taxed until the following year. I am of opinion that neither of these views is the proper construction to put upon the statute 59 Geo. III. ch. 7.

The first section of the act declares that after the first Monday in January, 1820, and for every subsequent year, every acre of arable, pasture, or meadow land shall be rated at 20s., and every acre of uncultivated land shall be rated at 4s.; and the 4th section declares that all lands shall be considered as ratable property which are holden in fee simple, or promise of a fee simple by land-board certificate,

order of council, or certificate of any governor of Canada, or by lease. Under the third section it is declared to be the duty of the assessors annually, between the first Monday in February and the sitting of the quarter sessions then next ensuing, to take and receive from any ratable inhabitant of the township a list of his ratable property, and to return a list of the whole to the said quarter sessions. Now, supposing that the assessor should go round the township in the latter end of March, and should find that persons had obtained patents for their lands but a few days before his calling upon them, and had settled on their lots, would such persons be liable for that year's taxes? I do not think that it admits of any doubt that such persons would be liable for the year's taxes. The thirteenth section declares that the lands described in the schedule returned by the surveyor general shall, from the time they are returned in the said schedule, be assessed and charged. I do not understand that expression to mean that such lands begin to pay the yearly tax from the date of such return, because, if so, then the inconvenience which was stated by the plaintiff's counsel in argument would follow, that there might be one time of commencement for taxation in one township, and another for another township, and there might even be different times in succeeding years for the same township, according to the dates of the yearly returns of the surveyor general. The limitation of the time to the 1st July in each year for the surveyor general to make such returns I do not understand to be for the purpose of rendering the lands liable to be taxed in the following year, but, on the contrary, that all the lands so returned up to the 1st of July would be liable to the current rates of that year upon the schedule being returned. The expression in the thirteenth section is that such lands so returned "*be assessed and charged to the payment of the rates or taxes imposed by this act.*" And, by the act, the rates to be imposed are after the first Monday in January, 1820, and for every subsequent year. I am of opinion that the lands in these cases were liable for the taxes for the whole of the year 1820, and not merely from the 1st of July of that year. This construction creates no

difficulty, for the lands so liable to taxes did not appear upon the township rolls, but were returned directly to the treasurer of the district, and he was required to keep accounts against the different lots. The treasurer had only to charge the pound rate which the justices at the sessions after they had the returns from the assessors should have fixed upon the ratable property of the district for the current year. I think the plain obvious meaning of the act is, that all lands which should be returned by the surveyor general before the 1st July should be liable to that year's taxes.

In these cases it seems that the taxes for the eight years were calculated up to the 1st of July, 1828, when they should have been calculated to the 1st of January, 1828. The sum is correct enough, and it only remains to be considered whether the warrant should be considered as void for omitting a part of the year 1820, and including a part of the year 1828. I am of opinion that the warrant is not to be considered void on this ground. That part of the warrant stating the taxes for the eight years to be up to 1st of July, 1828, which would include any part of 1828, may be rejected as surplusage; and it was not in the power of the treasurer or the justices, according to my view of the act, to remit any portion of the year 1820, and the taxes for that whole year must be considered as forming a portion of the sum due, and consequently the eight years expired on the 1st of January, 1828. The limitation of the commencement to be the 1st of July, 1820, I look upon as not vitiating the warrant, because if the whole year's taxes were due, there being no previous taxation of the lands, there could be nothing more necessary in the warrant than to shew that eight years were in arrear, previous to the year in which the warrant issued, and it did so in these cases.

I think the verdict for the defendants must be allowed to stand.

Per Cur.—Rule discharged; postea to the defendants in each case.

KEELEY ET UX. V. RAILE.

FINLAY V. RAILE.

Protection to Justices against costs—4 & 5 Vic. ch. 26, sec. 40, not repealed by 14 & 15 Vic. ch. 54.

Held: First, That the facts of this case, stated below, were such as to entitle the defendant to the protection afforded by 4 & 5 Vic. ch. 26.

Secondly, That the privileges extended by that statute to justices, as regards exemption from costs, are not cancelled by the late act, 14 & 15 Vic. ch. 54.

These were actions of trespass and false imprisonment. Plea, not guilty, "by statute." Tried before Macaulay, C. J., at Kingston.

In Keeley et ux. v. Raile, a verdict was given for the plaintiff, and 2*l.* 10*s.* damages.

In Finlay's case, there was a verdict for the plaintiff, and and one shilling damages.

In Keeley's case, after the trial, the plaintiffs moved for a certificate of the judge, under the statute 4 & 5 Vic. ch. 25, sec. 67, and ch. 26, sec. 40, that he approved of the verdict. This was reserved for consideration.

In Finlay's case the like certificate was moved, and the learned judge refused it.

Ultimately no certificate was granted in either case, and the plaintiffs entered their judgments, taxing, nevertheless, full costs.

The defendant, as a justice of the peace, on the 2nd of July, 1851, issued his warrant to a constable, reciting an information and complaint on oath of Daniel Keeley, that Margaret Keeley, wife of Martin Keeley, and Martin Keeley her son, did, on the 1st of July, 1851, "commit a trespass on Daniel Keeley, by forcing into his premises, which he peaceably occupies, contrary to the form of the statute;" and commanding him to apprehend them, and bring them before him, to answer to the said charge. And on the 3rd of July the defendant convicted them, "for that they did forcibly enter upon, and commit damage and injury to and upon the premises of Daniel Keeley, situated, &c., contrary to the form of the statute," (not specifying the nature of the injury or damage.) And he adjudged Margaret Keeley, for the said offence, to forfeit 2*s.* 6*d.*, as a reasonable compen-

sation for the damage and injury, and to pay 14s. 4*d.*, being half the costs ; and that she should pay those sums on or before the 13th of July, or be imprisoned for one calendar month unless sooner paid : and, in the same conviction, he adjudged Martin Keeley to pay 2s. 6*d.*, as a reasonable compensation for said damage and injury by him committed, and 14s. 4*d.*, for his half of the costs, with the same clause as to commitment in case of non-payment on or before the 13th of July : and he directed the fines of 2s. 6*d.* to be paid to Daniel Keeley, and also the 1*l.* 8s. 8*d.* for costs.

The costs taxed in the action of trespass were 45*l.* 1s. 3*d.*, the disbursements for witnesses being very heavy. The writ of summons in the action was issued on the 30th of August 1851. Judgment was entered on the 28th of February, 1852. On the 12th of March, 1852, the defendant moved a judge in chambers to stay proceedings on the judgment, on the ground that no costs should have been taxed to the plaintiff without a judge's certificate, under 4 & 5 Vic. ch. 26, and that none was obtained.

The declaration was against the defendant, describing him as a justice of the peace. The defendant pleaded the general issue by statute. The plaintiff gave the usual notice, a month before action brought to the defendant as a justice of the peace.

In Finlay's case, the costs taxed were 19*l.* 4s. 4*d.* The circumstances of the two cases were the same, Finlay having accompanied Keeley and his wife in committing the act complained of, which was nothing more than an entry against Daniel Keeley's will, and contrary to the prohibition of his tenant, upon some land which she made claim to. It was not a case within the act for punishing malicious injury to property ; and there was an irregularity in the justice's proceedings, for he had taken no information on oath, it seemed, till after he had made the warrant—that is, he did not first swear the complainant, or his witness, to the statement, though he did directly afterwards. The conviction and warrant stated no offence sufficient to justify an arrest.

There was no doubt, however, but that the defendant acted

in good faith, though ignorant of his duty. He was reluctant to act in the matter, as it was a family dispute.

Phillpotts, for the defendants, moved to set aside the judgments for irregularity, with or without costs, on the ground that no costs should have been allowed, or no more costs than damages; or for a revision of costs upon that ground.

Richards shewed cause.

The questions in each case were, whether, under the circumstances, the case was one in which the protection of the statute 4 & 5 Vic. ch. 26, sec. 40, would apply, supposing it were still in force: secondly, whether the late stat. 14 & 15 Vic. ch. 54, applies to this species of protection—that is, against the costs of the action: thirdly, if it does, then whether the 4 & 5 Vic. ch. 26 should in these cases be held to be repealed by it, the notice of action being before the 14 & 15 Vic. ch. 54 was passed, and the process in the action taken out the same day that act was passed, viz., on the 30th of August. It was not shewn whether the suing out of the writ or the giving the royal assent to the act was prior in point of time.

ROBINSON, C. J., delivered the judgment of the court.

The justice has no doubt greatly erred in the discharge of his duty, but that alone would not deprive him of the protection of the act. It renders it only the more important for him. His intentions are not impeached. The case of *Beechey v. Sides*, 9 B. & C. 806, and many others that might be referred to, leave no doubt on that point, and the legislature have shewn their intention to be, that the justice shall have the benefit of the protection, whenever he acts *bonâ fide* in the supposed execution of his duty. The 9th section of 14 & 15 Vic. ch. 54, is explicit to that effect.

Then, has the late statute 14 & 15 Vic. ch. 54 deprived the justice of the protection afforded by our statute 4 & 5 Vic. ch. 26, sec. 40. The preamble of that act shews that the legislature meant to embody in one act all the special protections which were to be extended, but they have made no provision of the nature of that which is now in question—disabling a plaintiff who recovers against a justice from

claiming costs of suit, unless the judge who tried the cause shall certify his approbation of the action and of the verdict. Does their act then cancel the privilege given in this respect by the 4 & 5 Vic. ch. 26, sec. 40? I am of opinion it does not, because the legislature tell us what they intend to repeal and they have left this protection untouched. They do not repeal all acts which afford protection to justices, but only such acts or parts of acts as confer certain protective privileges which are specified in the first clause of this new statute, and nothing in that clause touches the provision now in question, which is not one relating to amount of costs, but to the right to costs.

We think the rule should be made absolute for setting aside the judgment unless the plaintiffs remit the costs.

CANADA COMPANY V. PETTIS.

SAME V. SAME.

Case for overflowing Land—License—Corporation.

Case for overflowing land of the Canada Company. The defendant produced a letter to one S. under whom he claimed from the plaintiffs' agent saying that the land would be sold to him for the purpose of erecting a saw-mill, on certain specified conditions,—two of which were that the mill, should be in operation within twelve months, and that he should furnish the Company or their settlers with lumber at a reasonable rate.

Held—That this letter could not be construed as a license to the defendant to overflow the plaintiffs' land to any extent necessary for working his mill, without clearly shewing that the probable effect of building the mill and putting up the dam, was known to and contemplated by the parties at the time.

Held also, that the plaintiffs as a corporation could not be bound, with respect to such an injury as was shewn in this case, by anything done by their ordinary agents, without special authority.

These were actions on the case for overflowing lands of the plaintiffs, situate in the township of McGillivray and Bosanquet (in different counties): one of the actions was tried at Goderich, the other at Sandwich.

In the first case the plaintiffs obtained a verdict for 500*l.* damages upon the undertaking of the plaintiffs, through their counsel in open court that nominal damages would be taken if the defendants should abate the nuisance and pay costs.

In the latter case there was a verdict for the plaintiffs, and one shilling damages.

In the case tried at Goderich, the declaration charged that

the plaintiffs long before, &c., were possessed of 10,000 acres of land in the township of McGillivray, through which the river Sable used to flow, and of right ought to flow; yet that the defendant, well knowing, &c., therefore, to wit on the 1st of January, 1834, and on divers other days between that day and the commencement of this suit, wrongfully erected a dam across the river below the plaintiffs' lands and continued the same to the commencement of this suit: whereby the water had been penned back upon the plaintiffs' land, and had overflowed 5,000 acres thereof, rendering it of no value to the plaintiffs.

The defendant pleaded, among other defences—

1. That he committed the alleged grievances by the request, leave, and license of the plaintiffs.

2. That one Smart, on the said 1st January, 1834, by the request, leave, and license of the plaintiffs, built the dam, and the defendant, as his servant, and by his command, continued the dam until the commencement of this suit, by the like request and license of the plaintiffs.

3. That Smart, on the said 1st January, 1834, by leave and license of the plaintiffs, erected the dam, and that the defendant, as the occupier of the mill adjacent to the said mill dam under the said Smart and his assigns, by the like request, leave, and license of the plaintiffs, kept and continued the dam, and committed the said grievances from the said several times aforesaid, until the commencement of this suit, as he lawfully might, &c.

4. That the defendant, with Smart, Brewster, and other persons named, at the said times, when, &c., by leave and license from the plaintiffs, committed the said grievances, &c.

The plaintiffs replied traversing the license as alleged in these pleas respectively.

The pleadings in the other action were precisely similar, the injury complained of in that action being to lands of the plaintiffs in the township of Bosanquet, in the County of Lambton.

On the trial of the first action before Macaulay, C. J., it was admitted that the defendant claimed under Brewster and Smart, having become a partner with them, but only

since November last. The mills were built in 1832 or 1833, and it was shewn that they did occasion a very large tract of land belonging to the plaintiffs to be covered with water, though the defendant contended that the quantity was exaggerated. The dam was built, in part, at least, on land belonging to the Company. It appeared that, in 1832, Brewster and Smart, desiring to erect a saw-mill, and to acquire some land of the plaintiffs on which there was pine timber, corresponded with Dr. Dunlop, the Company's agent, or officer, on the subject; and the defendant relied upon a letter written by Dr. Dunlop on the 9th April, 1832, for supporting his plea of license to Smart, coupled with evidence that the Company, through their agents, had bought lumber sawed at their mill in the intervening time, and that their officers were aware of the damage by back water, but did not complain till lately.

On the other hand, one of the commissioners of the Company, swore that he was not for many years aware of the extent of the injury occasioned by the dam;—that the right to overflow their land was not a subject of discussion or treaty with Brewster and Smart, but merely the purchase of land and the situation of the mill.

The learned Chief Justice considered that the 4th plea was the one best adapted to the defence, but that the letter of Dunlop relied on, did not support the plea of license; that it was in fact no license to overflow land, but referred to the sale of land at a certain price;—that it appointed no place where a dam might be built, and did not seem to contemplate a dam being built on the plaintiffs' land; and that it not being under the seal of the Company they would not be bound by it, even if it had amounted to the grant of an easement or a license. He held that nothing shewn could avail the defendant as proof of a license; that Dunlop's letter was written for a different purpose, and did not pretend to confer a license, and could not constitute a grant of an easement binding on the plaintiffs; and that no proof of mere acquiescence and forbearance would support the pleas nor the evidence which was given; that in 1834, soon after the dam was erected, the plaintiffs' commissioner or

agent, entered into a contract with the then proprietors of the mill, Messrs. Brewster and David Smart, to take on certain terms all the lumber, with some specified exceptions, which they should make at the mill until the 1st July, 1837.

The letter mainly relied upon for supporting the defence of license was a letter dated at Sandwich, 9th April, 1832, signed, "W. Dunlop," and addressed to Robert Smart, who was first concerned in building the mill. It was to the effect that Dr. Dunlop had communicated to the commissioners of the Company, Smart's desire to erect a saw-mill on the Riviere aux Sables, and was instructed to say that the pinery he required, would be sold to him at the rate of 7s. 6d. (per acre) on these conditions—viz., that he would build thereon a good and sufficient saw-mill, and that the Company would reserve the right of placing a lock (at their own expense) in his dam; that the saw-mill should be in operation within twelve months, and that he should furnish the Company or their settlers with lumber at a reasonable rate. These conditions being complied with, he said, the Company would give him a deed of possession, in free and common soccage, so soon as the land should be surveyed and paid for; that if he, Smart, would make the lock in the dam, the price should be deducted from his payment for his hand.

The plea of license to overflow the Company's land to an unlimited extent was attempted to be supported by this letter of Dr. Dunlop, of whose precise position in the Company, or to what extent and in what description of transactions he was authorized to bind them, and by what formality, no evidence was given.

The plaintiffs obtained a verdict for 500*l.* damages, upon an undertaking, through their counsel in open court, that nominal damages would be taken if the defendant should abate the nuisance and pay costs.

In the latter case (tried at Sandwich), there was a verdict for the plaintiffs and 1*s.* damages. The evidence in effect was the same in both cases.

Vankoughnet, Q. C., with whom was *Cooper*, obtained a rule *nisi* in the first case for a new trial, with or without

costs, on the ground that the verdict was against law and evidence, and because the damages were excessive, or for misdirection, and on affidavits. They cited *Liggins v. Inge*, 7 Bing. 682; *Winter v. Brockwell*, 8 East. 308; *Bridges v. Blanchard*, 1 A. & E. 536; *Wood v. Manley*, 11 A. & E. 34.

Cameron, Q. C., shewed cause, and cited *Robinson v. Fetterly*, 8 U. C. R. 340; *Beaver v. Read*, 9 U. C. R. 152.

ROBINSON, C. J., delivered the judgment of the court.

If this had been a case of an individual proprietor acting in his own behalf, and capable of binding his rights, real or personal—using no greater solemnities than the Statute of Frauds requires, unless in those cases in which an assurance by deed is necessary upon principles of the common law—the first question would have been whether his agreeing to sell the land to Smart, in order that he might take from it timber to be sawed in the mill which he was going to erect, or anything contained in such a letter as was written by Dr. Dunlop, could be held to constitute a license to overflow the land of such individual to any extent, unforeseen, perhaps, by either party, that might be found necessary or convenient for working the proposed mill;—or whether it would not be more reasonable to hold, that the only object of writing the letter was to acquaint Smart with the conditions on which the land would be sold to him, assuming that he had ascertained, or would ascertain, that he had it in his power to erect and use a saw-mill upon the land which he already held, or on that which he proposed to acquire, without doing damage to the property of others; and that there was nothing in the letter which would relieve him from the necessity of acting at his own peril in that respect.

The next question would be whether either that letter, or the subsequent conduct of the individual, amounting to an apparent acquiescence, would be binding upon him—or whether the other party would not require a grant by deed to protect him in the assumed use of an easement upon his neighbour's property.

On the first of these points I am of opinion that, without clear evidence that the probable effect of the building the

mill and putting up a dam was known to and contemplated by the parties at the time, it would be contrary to reason to infer a license to commit such an injury from anything contained in the letter relied upon, and indeed that the letter imputes no license to interfere in any degree with the enjoyment of the property of the person writing it; and I do not see in the other evidence in the cause anything that could be properly taken to imply a permission to commit the injury complained of.

It is sworn by Mr. Jones that for years after the sale of the premises took place, he was wholly unaware of the great quantity of the Company's land which the dam had rendered useless. Nothing, indeed, can shew more strongly how little foundation there is for concluding that any such permission was understood and intended to be given, than the inconsistent pretences advanced since this litigation has arisen. At one time the defendant, or those concerned with him in interest, endeavour to make out that the injury is comparatively trifling, and is such as ought to be and might be quietly acquiesced in by the Company, and that in talking of thousands of acres being overflowed, they are exaggerating the injury most unreasonably; but when the object was to make an advantageous bargain with the Company, and to obtain large compensation for consenting to pull down the dam, Mr. Brewster represented, in a letter produced on the trial, that the Company could well afford to make him the compensation he required, for that they would thereby be rescuing from destruction some 5,000 or 10,000 acres of land rendered useless by the dam.

If it had been the case of an individual proprietor, and if the evidence had clearly established a license to the full extent of the injury proved, which we think it does not by any means, then upon the next point,—whether a parol license of this kind would protect the defendant, or whether he must not fail in this action against him for the injury, because he cannot shew a grant of an easement under seal. I am not sure that I might not find myself opposed in opinion to one or both of my brothers. It is still my understanding of the law on this point, as I have intimated in

the case of *Robinson v. Fetterly*, 8 U. C. R. 340, and have explained more at large in a case of *Beaver v. Read*, very lately disposed of by us (a), that although a parol license to overflow another's land, or to exercise any easement in the soil of another, would not give a right on which the licensee could stand if he were himself advancing it as a plaintiff, and were suing the other for obstructing him in the enjoyment of an easement which he claimed to have thus acquired; yet that it would avail the licensee as a protection against an action of the licensor suing him in tort for doing the very act which the licensor had, by parol, authorized him to do. The distinction is plainly taken in *Carrington v. Roots*, 2 M. & W. 255, and in *Liggins v. Inge*, 7 Bing. 682, and there is nothing in my view of the case of *Wood v. Leadbitter*, 13 M. & W. 840, or any more modern cases, that can be said to be opposed to it. I endeavoured to make this appear in the case of *Beaver v. Read*, and need not go over that ground again, especially as I think there is in the evidence of this case no sufficient proof of a license by parol; and if there were, and if we should all concur in thinking such a license might serve to protect a defendant against a claim for damages as a wrong-doer, yet there is this further difficulty in this case, that it is not an individual whose rights are in question here, but a corporate body, and nothing can be found in the law of England or of this province, nor even, I may venture to say, in adjudged cases in other countries acting in accordance with the English common law, but taking in general a great deal more latitude in their method of dealing with the rights and interests of corporations, which could support us in holding that these plaintiffs could have their interest in some thousands of acres of land compromised and rendered worthless to them by anything done by their ordinary agents without any special authority to bind them in this particular manner; or rather, which is contended for here, by the mere tacit acquiescence of such agents. We could not hold this to be a matter of that constant and ordinary occurrence in the usual transaction of the Company's

(a) Ante page, 152.

affairs through their agents, that an authority so to bind them could be implied upon any principle that has been applied to corporations; and upon these grounds, we are of opinion that the verdicts have been properly rendered for the plaintiffs. As to the damages being excessive, nominal damages were probably given in the case last tried on account of the substantial damages which had been given in the other, for in truth the injury proved to the lands in the county of Lambton seemed to call for much greater damages than the injury to those in the township of McGillivray. But we cannot pretend to say that the damages were certainly excessive, taking Mr. Brewster's account of the effect produced by the dam. It is true this defendant's liability began at a recent period, but the damage to the plaintiffs in preventing sales and settlement might accrue to a large amount in a short time, for all that we can know; and the amount of damages is rendered unimportant by the understanding come to at the trial (and which the court would of course see carried out), that on the nuisance being removed the damages will be remitted.

Rule discharged.

DOE V. LANGS.

Trespass—Judgment in ejectment replied as estoppel.

In an action of trespass for mesne profits, a judgment recovered in ejectment for part of the premises is an estoppel against the defendant's denial of the plaintiff's interest in such portion.

Trespass for mesne profits—Plea, that the close was not the close of the plaintiff. To this plea the plaintiff replied by way of estoppel, a judgment recovered in ejectment for part of the close in which, &c.; and as to the remaining part of the premises not included in the said judgment, but covered by the plea in this cause, he entered a *nolle prosequi*.

The defendant demurred to this replication, assigning for causes that the judgment mentioned, being a judgment in ejectment merely, is not conclusive upon the defendant, and cannot be set up against him as a complete bar to that portion of this action to which the replication applies.

Read, for the demurrer, cited *Doe v. Challis*, 15 Jur. 900; *Doe Fellowes v. Alford*, 1 D. & L. 470; *Doe v. Harlow et al.*, 12 A. & E. 40; *Overton v. Harvey*, 1 L. M. & P. 233; *Carter v. James*, 2 D. & L. 237.

Martin, contra, cited *Aslin v. Parkin*, 2 Burr. 665; 1 *Smith's Lea. Ca.* 264, S. C.

ROBINSON, C. J.—The judgment in ejectment being between the same parties, and applying, as it does, to the very time for which compensation is claimed, and to the very premises to which the plaintiff desires to apply it, and which are part of the premises in question in this action, we think it clear that it is an estoppel against the defendant's denial of the plaintiff's interest in such portion of the premises, and if it be, then the defendant's plea can be no bar to the whole of the plaintiff's action.

Judgment for the plaintiff on demurrer.

IN RE CROOKSHANK.

Application for Mandamus to the Judge of the Division Court, refused.

A. was defendant in the Division Court in a suit brought to try the right to a picture seized under execution, and which he claimed. Being absent when the cause was called on, judgment was given against him; and he obtained a new trial on paying into court the amount for which the picture was seized, to abide the event of a trial. A verdict was afterwards given against him. On applying for the money, he found that it had been paid over to the execution creditors. He then enquired for the picture, but it had been seized and sold under other executions.

Under these circumstances, a rule was moved for a mandamus to the judge of the Division Court, to make an order on the clerk to pay to A. the sum deposited; but the court held that they could not interfere.

Mr. Crookshank applied to this court for a rule *nisi* for a mandamus to the judge of the First Division Court of the counties of York, Ontario, and Peel, to make an order on the clerk of the said court to pay over to him (Crookshank) 40*l.* and interest.

Mr. Crookshank swore he was party in a cause in the said Division Court in May, 1851, between Hall and Ritchie, as execution creditors of one Hayward, as plaintiffs, and him (Crookshank) as defendant, to try the right of property in a picture seized under an execution of Hall and Ritchie against Hayward, and claimed by Crookshank: that being

absent when the cause was called on, judgment was given against him for his non-appearance: that he obtained a new trial on his paying into court the amount of the execution and costs for which the picture had been seized, to abide the event of the suit, as he understood; that upon the order of the court to this effect, he paid 40*l.* to the clerk, being such amount: that the cause afterwards resulted in a verdict against him, establishing that the picture was Hayward's: that deponent supposed that the picture would then be sold upon the execution, and his money returned to him: that he applied next day to get back the money, and was told by the clerk that he had paid out the 40*l.* to Hall and Ritchie, and that the deponent might have the picture: that he thereupon enquired for the picture, and was informed that it had been seized under other executions, and sold; and so he has neither his money nor the picture, for which he formerly paid 43*l.*

This statement was corroborated by other affidavits. It seemed that the bailiff, when he learned that the 40*l.* had been paid into court, abandoned the seizure, and took out the money, and applied it to satisfy the executions.

The judge's order was to suspend the return of execution till the next court day, on the defendant paying into court the amount of the execution and costs to *abide the event* of a trial by a jury on the next court day, and giving written notice to the plaintiffs to appear and try at the next court day.

It was stated that the judge of the Division Court, being anxious to give relief to the applicant, but being at a loss to know what order he could make, would be willing to act according to the opinion of this court.

ROBINSON, C. J.—It is impossible that we can interpose in this case. It comes in no shape before us by way of appeal, and could not be so brought up. There is no judgment in the matter, and if there were, we have no control in such a case. To give any pretence for coming to us for a mandamus, it is indispensable that some definite order should have been required to be made by the judge, which he refused to make, and which it could be shewn he was bound to make.

The party grieved must take advice of counsel as to what remedy he has under the circumstances for his money having passed, as it has, improperly into the hands of the execution creditors, whose right to sell the picture in execution was delivered in his favour, and who had in consequence no claim to call for the money.

Rule refused.

FRAZER v. LAZIER.

Registration of chattel mortgages—12 Vic. ch. 74, not applicable to terms of years in real estate.

K. being in possession of certain premises under a lease for six years, assigned his term by way of mortgage to one R. This assignment was registered in the County Court. K. continued in possession for some time after this assignment, until R. entered. The defendant purchased from R. and went into possession. The assignment to R. was never re-filed;—more than a year after its original filing the unexpired term was sold by the sheriff under an execution against K., and the purchaser brought ejectment.

Held, first, that the 12 Vic. ch. 74, applies only to mortgages of movable goods, and that there was therefore no necessity to register the mortgage in this case according to its provisions.

Secondly, that if the mortgage had come within that act it would have been void, not having been kept in force by registry, or accompanied by immediate and continued possession.

Ejectment.—A verdict was taken for the plaintiff, subject to the opinion of the court upon the following case:—

One Daniel Smith, by lease under seal, on the 20th of March, 1849, demised the premises in question to one William Kerr for six years, from the first day of April then next.

While in possession under this lease, on the 24th of November, 1849, Kerr made an assignment of it under seal, by way of mortgage, to one James Richardson. On the 15th October following, this assignment was registered in the office of the county clerk of the county of Hastings.

Kerr continued in possession until the 19th of October, 1850, when Richardson entered; and he remained until the 12th of February, 1852, when the defendant purchased from him, and went into possession.

On the 2nd of November, 1850, the plaintiff obtained judgment in assumpsit against Kerr, and on the same day a *fi. fa.* against goods was issued, returnable on the first of Michaelmas term, 1850, which was returned

nulla bona. An *alias fi. fa.* was then issued, returnable on the last day of that term, on which the sheriff made about 20*l*. An *alias fi. fa.* for the residue was issued *after the 15th of October, 1851*, returnable on the first day of Michaelmas term then next, to which "goods on hand" was returned by the sheriff; and a *ven. ex.* was then issued, on which the unexpired term for years under the demise was sold by the sheriff, who gave his deed to the plaintiff as purchaser of the said term.

The assignment of the lease to Richardson had not been re-filed with the clerk of the County Court since its original filing.

The question for the court is—as the possession by Richardson did not accompany the assignment, did the fact of his going into possession afterwards and after the assignment was filed, and before the time for re-filing the same according to the statute had arrived, do away with the necessity of re-filing the same; or did the said assignment cease to be valid in consequence of its not being re-filed?

If the court are of opinion that the assignment ceased to be valid, then the verdict for the plaintiff is to be maintained; if, on the other hand, the entry into possession by Richardson in manner above mentioned did away with the necessity of re-filing the same, then the verdict to be entered for the defendant.

Vankoughnet, Q. C., for the plaintiff.

Kirkpatrick, Q. C., for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the statute 12 Vic. ch. 74 applies to mortgages of goods and chattels in the restricted sense of movable goods, and not to mortgages of terms for years in real estate. The use of the term "delivery," and the words, "possession of the things mortgaged," seem to us to point to goods wholly personal in their nature—such things as could be delivered over from hand to hand.

If our opinion were different on this point, then it is my present impression (and I believe my brothers agree in this), that the assignment to Richardson should be held void, because

it was neither kept in force by registry, according to the acts,—nor did the mortgagee, Richardson, go into possession at the time of its execution, so that it could be said to have been accompanied by immediate delivery, and possession held continually after such delivery,—one or other of which must be shewn whenever the act applies. But, as we consider this case not to be within the statute, being a mortgagee of a term for years, we are of opinion that a verdict should be entered for the defendant.

Verdict to be entered for defendant.

HOULISTON V. PARSONS.

Note made on Sunday in payment for goods sold not void in the hands of an innocent indorsee—8 Vic. ch. 45.

Under 8 Vic ch. 45, sec. 2, a note made on Sunday in payment of goods sold on that day is void as between the original parties, but not as against an indorsee for value, and without notice.

Appeal from the County Court of the United Counties of Lincoln and Welland.

Action on a promissory note made by the defendant on the 9th of March, 1851, “at St. Catharines, to wit, at Niagara, in the County of Lincoln,” whereby the defendant promised to pay to one Edward Lyons, or order, 55*l.* 5*s.* for value received, four months after date;—stating indorsement of the note by Lyons to one Lee, and by Lee to the plaintiff.

The defendant pleaded that the note was drawn and delivered by the defendant to Lyons on a Sunday—to wit, on the 9th of March, 1851—and was made and given in payment of goods sold and delivered by Lyons to the defendant on that day, being a Sunday—contrary to the form of the statute, on which account it was void.

This plea was demurred to, and judgment was given in the County Court in favour of the plaintiff on the demurrer, which judgment was appealed from.

W. Eccles, for the appeal, cited *Begbie v. Levi*, 1 Cr. & J. 180.

Boomer, contra.

4 r—VOL IX. Q.B.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the judgment was properly given for the plaintiff, and that the appeal must be dismissed with costs.

Independently of any objections to defects in the plea, we think the statute 8 Vic. ch. 45, in the second clause only makes void all sales and contracts for sale of any real or personal property made on a Sunday; but not making void the security given in payment for any goods so sold, this note is not made void in the hands of a *bona fide* indorsee for value, and without notice—not being a contract within the terms of that clause, and liable only to the exception that it was made in furtherance of such a contract. This would make it void as between the original parties, but not against this plaintiff.

• Appealed dismissed.

THE QUEEN EX REL. McNAMARA V. CHRISTIE & PAINTER.

Election of School Trustees—13 & 14 Vic. ch. 48—"Taxable inhabitants," meaning of.

Persons who are rated only for statute labour, and are not householders, are not "taxable inhabitants" within the meaning of 13 & 14 Vic. ch. 48, sec. 22, and cannot, therefore, vote at the election of school trustees.

Quære whether the fifth and seventh clauses of that act apply to the electors of school trustees for towns, or only to those for townships—*Semble*, that the seventh, at least, applies to both.

Duggan obtained a rule *nisi* on the defendants, to shew cause why an information or informations in the nature of a *quo warranto* should not be exhibited against them, to shew by what right they respectively claim to be school trustees of the town of Niagara, and members of the Board of school trustees of that town, on the grounds.

1.—That the election held on the 14th of January, 1852, in and for the St. David's ward of the town of Niagara, of the school trustees, was not conducted according to law, because there were two other candidates—viz. Munroe and Bowen—both duly qualified, and for whom a majority of the taxable inhabitants of St. David's ward would have voted but the returning officer, John Ross, Esquire, refused to

take votes for them, or either of them, requiring that the "taxable inhabitants" should not only be taxable inhabitants of the said ward, but should be taxable inhabitants beyond the amount of ten shillings, before they could be allowed to vote.

2.—Because he refused to receive the votes of taxable inhabitants though tendered in favour of Munroe and Bowen.

The election was holden on the 14th of January, 1852.

Christie and Painter had, one eighteen, the other nineteen votes; Munroe fourteen, Bowen fifteen. Christie and Painter were declared duly elected, and had attended and voted at the board; and it was sworn that as many as seven taxable inhabitants offered to vote for Munroe and Bowen, but were refused, because they were only statute labour voters.

Against the rule it was shewn that McNamara, the applicant, was a resident of St. David's ward, and entered on the collector's roll for that ward as liable to pay ten shillings, in lieu of statute labour, but was not on the roll of that or any other ward of the town for any tax upon income, or on real or personal property, or liable to pay within the town any tax except the statute labour commutation; and so also of Aillis, the other person on whose affidavit the information was moved for; and it was sworn that if all those similarly situated had been allowed to vote, it was believed there would still have been a majority for the two who were returned.

The returning officer swore that he rejected no vote of any person assessed on the roll for property or income, and confirmed the statement that he rejected McNamara and Aillis, who claimed solely on the ground that they paid ten shillings in lieu of statute labour, not considering them to be "taxable inhabitants" within the meaning of the act.

Vankoughnet, Q. C., shewed cause, and cited the Queen ex rel. Lawrence v. Woodruff, 8 U. C. R. 336; In the matter of the Aston Union, 6 A. & E. 784; Cole on *Quo Warranto*, 162.

Duggan, contra, cited Rex v. Ramsden et al., 3 A. & E. 456; Rex v. Jefferson, 2 N. & M. 437; Cole on *Quo Warranto*, 187.

ROBINSON, C. J., delivered the judgment of the court.

The School Act, 13 & 14 Vic. ch. 48, under which the question arises who have the right to vote for school trustees in incorporated towns, enacts, in the twenty-second section, that in each ward "two fit and proper persons shall be elected school trustees by a majority of all *the taxable inhabitants* of such ward."

It has been made a question whether the fifth and seventh clauses of the act apply to the electors of school trustees for towns, or only to those for townships. They form part of one of the general divisions of the act, which is headed "election and duties of school trustees," not of school trustees for townships only; and if nothing that is in that division of the act applies to trustees for cities, towns, or villages, but only to those for townships, then this act is manifestly imperfect, for there are various enactments which are in their nature as applicable to, and as requisite for, the office of school trustees for cities, towns, and villages, as for those of townships, and for which there is no provision made in regard to cities, towns, and villages, if these latter are to be held not to be included for any purpose within the first general division of the act. If, on the other hand, the school trustees for towns should be held to be included within the fifth and seventh clauses, (though there are doubtless several others of the clauses of that same division which are not applicable to them), then it is plain enough that the voters for school trustees in towns, &c., as well as townships, must be freeholders or householders.

My inclination at present is rather in favour of holding that the fifth and seventh clauses, or at least the seventh, may be so construed as to include both classes of elections. I believe that to have been the intention of the statute, though there are some difficulties in the way of that construction. But on the broader ground that "taxable inhabitants" does not include persons who are not householders, and who are only rated for statute labour, we all think the returning officer was right in rejecting such voters.

In 2 Inst. 702, the word "inhabitants," as used in the statute 22 Hy. VIII. ch. 5, which provides that bridges shall

be repaired by the *inhabitants* of the shire or riding, &c., is held to extend to none but *householders*—not to servants or others who, though residing therein, are not householders.

In Gateward's Case, 6 Co. 60, the court say, "in these words inhabitants and residents, are included tenant in fee-simple, tenant for life, for years, tenant by elegit, tenant at will, &c., and he who hath no interest *but only his habitation and dwelling*," which clearly means that he must at least, upon some footing, have a habitation or dwelling held by himself, and not be merely an inmate in another person's dwelling, which any of these persons assessed only for statute labour might be.

The language of Lord Tenterden, in *Rex v. Hall*, 1 B. & C. 136, supports the construction which we put on the word "inhabitants," as used in this act, though the word may be used on occasions and for purposes when it might be proper to give it a larger construction. In *Rex v. Mashiter*, 1 N. & P. 314, it is intimated that the term "inhabitant," is to be construed according to the subject matter in which it is found, and that it has not any precise legal meaning. On this principle, we can have no difficulty in believing that the legislature never meant to leave the selection of those who were to appoint teachers of youth to persons who are not even householders, and possess no property real or personal, especially when the trustees among their powers have the power of assessing others.

We are of opinion that the rule must be discharged with costs.

Rule discharged.

MCLEAN V. HORTON.

Dower—Reference to arbitrators to assign—Pleading.

Action of dower. The tenant pleaded a reference to arbitrators and an assignment by them of certain specified land, of which the demandant had notice, and averred that he had always been, and still was ready to abide by such assignment.

Held, on demurrer—Plea bad, for not shewing that the assignment had been actually made.

Action of dower. The plea set up a submission by the demandant and tenant to arbitrators to award upon the

dower to be assigned, and an assignment of dower made by the arbitrators, (setting out the part assigned by metes and bounds), of which the demandant had notice ; and it averred that the tenant always had been, and still was, ready to abide by the assignment.

Demurrer. Because it is not shewn that the demandant ever assented to, or accepted such assignment ; or that the tenant ever acted thereon by executing any deed or instrument of assignment.

G. Sherwood, for the demurrer, cited *Park on Dower*, 269 ; *Roscoe on Real Actions*, I. 223.

Richards, contra, cited *Co. Litt.* 35, *a*.

ROBINSON, C. J.—We find no authority supporting this plea. It does not set up an assignment of dower made by the tenant, and rely upon it as a sufficient assignment, though made not by deed, but only by parol ; but it shews only an obligation to assign in pursuance of an award. The tenant should have assigned according to the award ; and then, if that would have been binding upon the demandant, he would have discharged himself of the claim.

It is laid down as good law, that a woman entitled to dower cannot enter till it be assigned to her either by the heir, terre-tenant, or sheriff, neither of which has been done in this case.—*Plowden*, 529 ; *Crabb on Real Property*, sec. 1159.

Per Cur.—Judgment for demandant on demurrer.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

FROM TRINITY TERM, 15 VICTORIA, TO
EASTER TERM, 15 VICTORIA.

ABSCONDING DEBTOR.

Attachment—Liability of contractors with an absconding debtor to his assignees of the contract before his departure.—1. The plaintiff contracted with the defendants to build for them a mill-dam on certain terms. H. and P. were his sureties. While carrying on the work, he assigned to them the contract and all his interest in it; he afterwards absconded, and an attachment was issued against him. The assignees carried out the contract, and then sued in the plaintiff's name for the money due. After action brought this attachment was withdrawn, and the defendants released by the attaching creditors from any right of action they could have against them, if they should pay over the money that might be recovered in this action. Within six months another attachment was placed in the sheriff's hands, of which the defendants were duly notified. *Held*, (the above facts being stated for the opinion of the court,) that the assignees were entitled to recover as well for the work done by the plaintiff before his departure as for that executed by them since; and that the defendants' paying would not be liable to the creditors of the plaintiff. *Clarke v. Proudfoot et al.*, 290.

ACCOUNTANT

Under 13 Eliz. ch. 4.—See "Will," 3.

ACCOUNT STATED.

Evidence of.—See "Evidence," 6.

ACTION.

Against magistrates for not returning conviction.—See "Magistrates," 1.

AGREEMENT.

See FRAUDS (STATUTE OF.)

Money made payable in "yearly proportions"—Effect of.—1. "For value received, I promise to pay James McQueen and Jacob McQueen, or their order, the sum of 102*l.* 15*s.* cy., to be paid in yearly proportions."

Held, that the effect of the above agreement was to give two years for payment. *McQueen et al. v. McQueen*, 536.

ALIEN.

Effect of 12 Vic. ch. 197.—Where an estate has become legally vested before the passing of 12 Vic. ch. 197, that statute will not operate to take it away from the possessor, and entitle

the heir-at-law, although an alien. *Doe dem. O' Connor & Rouse v. Maloney*, 251.

AMENDMENT.

See NUL TIEL RECORD.

Allowed after contingent damages assessed on demurrer.]—Under the circumstances of this case the plaintiff was allowed to withdraw his demurrers, on which contingent damages had been assessed, and to reply *de novo* to the defendant's pleas. *Malloch v. Scott*, 428.

ARBITRATION AND AWARD.

Sufficiency of award—disposal of issues.]—1. Assumpsit.—The declaration contained counts for work and labour, goods sold, money paid, had and received, and on account stated—to which the plaintiff pleaded non-assumpsit, payment, and a set-off. A verdict was taken for the plaintiff, subject to the award of W. H., chosen as sole arbitrator between the parties “upon all matters in difference between them, as well in this suit as all other matters up to the commencement of this suit;” costs to abide the event. The arbitrator awarded “that the plaintiff had good cause of action against the defendant in the said cause, and on the matters so submitted, and was entitled to a verdict therein; and he assessed and awarded the damages to be paid by the defendant to the plaintiff in the said cause at 43*l.* 8*s.* Held, that the award was good; that it disposed by necessary inference of all the issues in the cause; and that it was not uncertain. *Charles v. Carroll*, 357.

Assignment of submission bond, effect of—Evidence—Pleading.]—2. Debt on bond, conditioned to abide by the award of arbitrators.

The plaintiff insured his property

with the defendants; upon its destruction by fire a dispute arose as to the loss, and the matter was referred to arbitration.

After the fire, but before the award, the plaintiff assigned the bond of submission, the policy of insurance, and the money due thereon, to H. G. H.

Held, that the assent of the defendants to the assignment was not necessary.

Held also, that the assignment of the bond did not, under these circumstances, by vesting the interest in the assignee, affect the legality of the award made under it.

Held also, that the act abolishing districts (12 Vic. ch. 78) does not take away from the defendants the name given to them by their charter.

Semble, that the making of the award is not admitted by the pleadings in this case; but *held*, that it was sufficiently proved by shewing that the defendants had acted upon it by paying a portion of the sum awarded, and that their officer had stated in writing the particulars of the award, and the sum remaining due on it. *Hughes v. The Mutual Fire Insurance Company of the District of Newcastle*, 387.

ARREST.

See COMMISSIONER.

Privilege from.]—See “Parliament.”

ATTACHMENT.

Warrant of, under 12 Vic. ch. 69—who may execute.]—A constable of any town within the county in which a warrant of attachment is issued under 12 Vic. ch. 69, sec. 1, has authority to execute such warrant. *Delany v. Moore*, 294.

ATTAINDER.

See EVIDENCE, 7.

ATTORNEY.

See EVIDENCE, 5.

Fees for certificate.—1. The penalty of 4*l.* imposed by statute, where an attorney omits to take out his certificate in proper time, is payable in each of the courts, and is not the aggregate amount of the penalty incurred in the three courts for such neglect. *Quere*, as to the amount to be paid by an attorney for his certificates, where he has allowed the time specified for the Common Pleas and Chancery Courts to pass, but is in time to take out his certificate for the Queen's Bench. *In re Latham, an attorney, v. The Law Society*, 269.

Partners—Right to sue.—2. The defendant signed a written retainer of Messrs. D. & E., as his attorneys, to prosecute one M. While the suit was pending the partnership between them was dissolved, and E. retired, assigning to D. all his rights. D.'s name alone appeared as plaintiff's attorney on the record. *Held*, that D. might sue alone for the costs. *Dougall, an attorney, v. Ockerman*, 354.

Right to proceed for costs.—3. Where the plaintiff and defendant settled the suit without the intervention of the plaintiff's attorney, who afterwards went on and took a verdict, *Held*, that such verdict must be set aside, with costs to be paid by the attorney, it not appearing sufficiently, under the facts stated, that there was any collusion between the plaintiff and defendant to deprive him of his costs. *Plant v. Stone*, 458.

BAIL.

See RECOGNIZANCE.

BANKRUPT AND BANKRUPTCY.

See BILLS OF EXCHANGE and PROMISSORY NOTES, 4, 5.

Defendants not discharged from

covenant of indemnity by bankruptcy and certificate.—1. See "Covenant," 1.

What not a fraudulent concealment of property.—2. Where the wife of a bankrupt in Lower Canada had a remainder in lands in Upper Canada, expectant on the death of her mother, *Held*, that there was no interest which could vest in the assignees, and that his not disclosing such interest was not fraudulent. *Phillips v. Masson et al.*, 20.

Certificate under ordinance of Lower Canada, 2 Vic. (3) ch. 36—*Pleading.*—*Held also*, (DRAPER, J., dissentiente) that the certificate obtained by a bankrupt under the ordinance of Lower Canada 2 Vic. (3) ch. 36, prior to the passing of 7 Vic. ch. 10, may be given in evidence under the general issue, in like manner as the certificate and confirmation thereof by the Court of Review, as provided by the said act, may be.

Under the same pleadings evidence may be given of fraud on the part of the bankrupt in obtaining his certificate. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See DE INJURIA.—ILLEGALITY.—PLEADING, 1.—SET OFF.—SHIP REGISTRY ACT.—SUNDAY.

Due diligence in presentment.—1. The plaintiffs sued on a promissory note made by one Clarke, payable at no particular place, and endorsed by the defendant. The note was left at the bank in Cobourg, where the maker then resided, for collection; and the clerk who was to present it being examined, stated that before the note became due he heard that the maker had left Cobourg: that on its becoming due he went to the house in which Clarke had formerly resided, and found

only a woman, who could give him no information respecting Clarke. He made inquiries of more than one person who had known Clarke well, but their answers as to where Clarke had gone were conflicting. Witnesses were called for the defence, of whom Clarke's partner was one, who stated that no secret was made of his intended departure: that his furniture was advertised; and that they could at any time have given correct information as to his place of residence.

Held, that at least application should have been made at the places to which Clarke was said to have gone, and that due diligence had not been used to discover his residence; the question being, whether the action against an indorser would lie without its being shewn that the defendant could not, by using due diligence at some time before action brought, have presented the note to the maker. And *semble*, that the question of diligence is not wholly a question for the jury. *Browne et al. v. G. S. Boulton*, 64.

Indorsement of note by payee after action brought.]—2. A was indebted to the plaintiffs, and to get time offered them a note with an indorser. The plaintiffs agreed to accept one, and A. made a promissory note payable to the plaintiffs, and procured the defendant to indorse it in blank, and delivered it so endorsed to the plaintiffs. The plaintiffs discounted the note, having indorsed it under the defendant's indorsement. The note having been dishonoured, the plaintiffs took it up, struck out their indorsement, and again indorsed the note above the defendant's name, adding to their own name "without recourse," and then sued the defendant.

Held, that though the plaintiffs had not indorsed the note when the defendant indorsed it, and though their indorsement, making them stand as first indorsers on the note, was not written on it until after action brought, yet that

such indorsement by plaintiffs was sufficient.

Semble, also, that the defendant is estopped from denying that the plaintiffs' name was endorsed when it ought to have been. *Peck et al. v. Phippon*, 73.

Pleading—Consideration.]—3. Assumpsit by the indorsee of the payee of a note against the maker. *Plea*—that defendant made it for the accommodation of the payee, and without consideration, and that the plaintiff holds it without consideration.

Replication, that there was a good consideration for the making of the note—to wit, the amount of the note—and for the indorsing the note to the plaintiff—to wit, the amount of the note.

Held, on special demurrer, replication bad. *Allen v. Skead*, 217.

Assignees of bankrupt v. indorser—*Pleading.*]—4. Assumpsit (by the assignees of a bankrupt) on a promissory note made by the defendant, payable to one W. R. Fellows, and endorsed by W. R. F. to the bankrupt before his bankruptcy.

Pleas—1. That R. W. Fellows did not indorse. 2nd. That the defendant paid the note when it became due, but not stating to whom. 3rd. Payment before action, to bankrupt before his bankruptcy, in full satisfaction, &c., of all causes and rights of action, &c.

Held, on demurrer, 1st plea bad for the variance in the name. 2nd and 3rd pleas good. *Moore et al., Assignees, &c., v. Cook*, 261.

Notice of non-payment—Evidence—Protest.]—5. Assumpsit on two promissory notes, against the indorsers. *Plea* by one defendant, "no notice of non-payment."

A separate protest of each note was produced. One of these protests was dated on the day when the note fell due, and the other on the day after.

They both certified that the indorsers had been notified, but did not state when.

Held, that notice of non-payment was sufficiently proved as to both notes.

By 7 Vic. ch. 10, a note indorsed by the bankrupt before commission issued, though not falling due until after, may be proved as a debt under the commission; and to an action on such note against the bankrupt, the plea of bankruptcy is a sufficient defence. *Wood et al. v. Hutt & Clement*, 344.

Notice of non-payment — Verbal understanding to defeat an indorser's liability.]—6. A notice of non-payment sent to an indorser stated that the note was *duly protested* for non-payment, not saying that it was presented, held sufficient.

To an action on a promissory note, by the indorsee against the indorser, the defendant pleaded, that the note was intended to have been made to the plaintiff, or order, and endorsed by him to the defendant, to secure a debt due to the defendant by the maker, but by mistake it was made payable to the defendant or order; and he thereupon indorsed it to the plaintiff, in order to enable him to sue the maker, and on the understanding that the plaintiff should have no recourse against him as indorser.

Held, that such an understanding would form a good defence to the action. *Blain v. Oliphant*, 473.

BOND.

See BUILDING SOCIETIES, 3.—CONDITION.

To indemnify sheriff for not executing fi. fa.—Condition of.]—See "Sheriff," 2.

Debt on, for discharge of official duties.—Pleading.]—1. Debt on bond, given by defendant as one of

five joint and several obligors, conditioned for the proper discharge of certain duties by one A. B. T., as secretary and treasurer of a certain society.

2nd plea. "Not damnified."

3rd plea. If plaintiffs damnified, damnified by their own default.

5th plea. That the affairs of the plaintiffs were managed by certain directors: that from the making of the bond until the 31st of January 1850, A. B. T. did fulfil all things to be done by him pursuant to the condition: that from that time till A. B. T. ceased to be secretary and treasurer, plaintiffs managed the affairs of the said society, contrary to its rules, &c., whereby the defendant's liability was greatly increased; by reason whereof, &c., the defendant became discharged.

7th plea. The affairs were managed, &c.: that said directors did, without the consent of the defendant, order that one of the obligors should be released, which order became binding on said society, whereby such obligor was discharged.

8th plea same in substance as last.

Special demurrer to each plea.

Held, 2nd and 3rd clearly bad. 5th plea bad, because it was not shewn that the observance of the condition was qualified or affected by some matter existing and in knowledge of both parties, when bond given. 7th and 8th pleas bad, as shewing no release in law. *Farmers' and Mechanics' Building Society v. Langstaff*, 183.

Condition to make a deed—Effect of.]—2. Debt on bond conditioned to make a deed of 200 acres, "which is to be drawn by a U. E. right due to me." *Held*, not necessary for the obligee to tender a deed for execution. *Held*, also, that the obligor was bound to make a deed within a reasonable time. *Rogers v. Lake*, 264.

For performance of official duties—

Assignment of breaches—Demurrer.]

—3. Debt on bond. The condition set out on over was for the due performance by one A. B. T. of the office of secretary and treasurer of a certain society. In answer to a plea of performance the plaintiff replied, assigning for breaches, 1st. That it was a rule of the said society that the treasurer should have authority to receive all monies for them, "and that he should also deposit daily with the bank all such monies as he should receive," yet that he had received for the society a large sum of money, and had not paid it over, but had converted it to his own use. *Secondly*—That the said A. B. T. fraudulently represented a certain person to be a shareholder, and so induced the society to grant him a loan, whereby the money was lost.

Held, on special demurrer, that both breaches were well assigned. *Farmers & Mechanics' Building Society v. Whittemore*, 297.

BUILDING SOCIETIES.

See BOND, 1, 3.

May sue in their corporate name.]

—1. *Farmers & Mechanics' Building Society v. Langstaff*, 183.

Construction of 9 Vic. ch. 90, sec. 12.]—2. Under 9 Vic. ch. 90, sec. 12, the president and treasurer suing on behalf of a building society must be president and treasurer of such society at the time of commencing the action. *Doe dem. Morgan et al. v. Boyer*, 318.

Bond for performance of duties of secretary and treasurer—Pleading.]

—3. Debt on a bond given by C. & R., conditioned for the due performance by one D. of the office of secretary and treasurer of the Brantford Building Society.

7th plea. That the office is an annual one: that the said D. was appointed for one year: that the defendants became sureties for the term of

one year, and no longer: and that during such term D. faithfully performed the duties.

Replication—That the defendants did not become sureties for the period in the plea mentioned, or for any other specified time.

Held, on demurrer, replication good.

Under the Building Society Act, 9 Vic. ch. 90, it is not essential to the validity of a bond given for the performance of the treasurer's duties, that such treasurer should be joined in it with his sureties.

9th plea—That D. did not, before his appointment, become bound in a bond for the due performance of his office, in pursuance of the statute, &c.

10th plea—That the said bond is not a security taken in pursuance of the statute, by a bond entered into by the said D. with two sufficient sureties.

Held, on demurrer, both pleas bad for uncertainty.

11th plea—That the rules of the society did not provide that the treasurer or other principal officer, should, once at least in every year, prepare a general statement of the funds and effects, according to the statute.

Replication—That the rules of the society did provide that the statement referred to in the plea should be made at least once in every year according to the form of the statute, &c.

Held, on demurrer, replication good. *Wilkes & Buchanan, President and Treasurer of the Brantford Building Society, v. Clement & Reid*, 339.

BY LAW.

See MUNICIPAL CORPORATIONS.—PRACTICE.

CAPIAS AD RESPONDENDUM.

Bailable ca. re. may be sued out in a County Court from Commissioner.]

—A bailable *ca. re.* may be sued out in a County Court from a commissioner,

and may be executed by a constable, without taking it to the sheriff. *Quære*—Whether a constable can be compelled to execute such writ, as it is not directed to him, but to the sheriff, and the statute gives him no fee. But if he undertakes the service, and arrests the defendant, he is liable for an escape. *Story v. Durham*, 316.

CARRIERS.

By water, liability of—Exception against dangers of navigation—Evidence.—Where an exception against loss by dangers of navigation is contained in a bill of lading, and the vessel is in fact lost in a storm, the evidence of negligence or improper conduct must be very clear in order to make the ship owner liable; and although it lies upon the defendant in the first place to bring himself within the exception, yet this is sufficiently done by shewing a shipwreck from stress of weather: and the plaintiff is then called upon to establish that the loss would not have happened but from negligence or want of skill.

Harnden v. Proctor, 592.

CERTIORARI.

Removal of indictment to Queen's Bench after verdict.—An indictment cannot be removed by *certiorari* from the court of General Quarter Sessions to the Queen's Bench *after verdict*, even by consent of the parties. *The Queen v. Lafferty*, 306.

CHATTEL MORTGAGES.

Registration of.—See "Mortgage."

CLERGY RESERVES.

Appropriation of land for, in letters patent, under 31 Geo. III. ch. 31—effect of.—See "Crown Grant," 2.

COGNOVIT.

See WAIVER.

COMMISSIONER.

May issue bailable ca. re. in County Court.—A bailable *ca. re.* may be sued out in a County Court from a commissioner. *Story v. Durham*, 316.

COMMON SCHOOLS.

School trustees for towns—Power of.—1. The school trustees of towns, under 13 & 14 Vic. ch. 48, sec. 24, have unlimited discretion as to the number of schools to be kept up, and are not subjected to the restrictions in this respect imposed upon the school trustees for townships.

Where an estimate of the sum required for school purposes for a certain year was sent to the town council by the school trustees, and the council recognized such estimate by paying a portion of the amount, and submitted to the court their reasons for refusing to pay the balance, *held*, that they were precluded from objecting that the estimate was not laid before them *as by law required*. *The Board of School Trustees of the town of Brockville v. The Town Council of Brockville*, 302.

Election of School Trustees—13 & 14 Vic. ch. 48—"Taxable inhabitants," *meaning of.*—2. Persons who are rated only for statute labour, and are not householders, are not "taxable inhabitants" within the meaning of 13 & 14 Vic. ch. 48, sec. 22, and cannot therefore vote at the election of school trustees.

Quære—Whether the 5th and 7th clauses of that act apply to the electors of school trustees for towns, or only those for townships. *Semble*, that the 7th at least applies to both. *The Queen ex rel. McNamara v. Christie & Painter*, 682.

COMPUTATION (REFERENCE TO MASTER.)

Reference to compute interest on a judgment—refused.]—The court refused a rule to compute interest before the master in an action upon a judgment, where it appeared there might be ground for doubt as to the plaintiff's right to recover such interest, and the defendant resisted the application.

Eberts v. Traveller, 355.

CONDITION.

See BOND—DEED, 2.

Excuse of performance.]—Debt on bond, whereby the defendant bound himself under a penalty to make to the plaintiff a good and sufficient deed, clear of all incumbrances, of a certain strip of land, within the term of eight years.

Plea—That within the said eight years the council of the district of London made a certain by-law, establishing a public road over and upon the said strip of land; whereby the defendant was and has been since prevented making a good and sufficient deed, clear of all incumbrances, of the said strip of land to the said plaintiff.

Held, on demurrer, plea bad, as not shewing a good defence.

Held also, that the soil and freehold of roads, laid out under 4 & 5 Vic. ch. 10, does not vest in the crown.
Cæsar v. Norton, 100.

CONSIDERATION.

See ILLEGALITY.

CONSTABLE.

See ATTACHMENT.—ESCAPE.—CAPIAS AD RESPONDENDUM.

CONTRACT.

Liability of contractors with an absconding debtor to his assignees of the

contract before his departure.]—See "Absconding Debtor."

CONVICTION.

See MAGISTRATES, 1.

Requisites of, when form not given by statute.]—Where a form of conviction is not sanctioned by any express statute, it must be such as would be legal according to the principles of the common law; and in that case, a conviction which did not express that the party had been summoned, or that he appeared, nor that the evidence was given in his presence, cannot be supported. *Moore v. Jarron*, 233.

CORPORATIONS.

See BUILDING SOCIETIES.—MARMORA FOUNDRY COMPANY.—MONTREAL MINING COMPANY.

Not bound without special authority.]—See "Leave and License," 2.

COSTS.

See MUNICIPAL CORPORATIONS, 3

Right of Attorney to proceed for.] See "Attorney," 3.

Protection to magistrates against.] See "Magistrates," 2.

Trespass.]—1. In an action of trespass, where the judge does not certify under 22 Car. II, ch. 9; and where the verdict is within the jurisdiction of the County Court, the plaintiff is not entitled to full costs. *Hawkes v. Richardson et al.*, 229.

Recoverable on an extent.]—2. Poundage is recoverable from the defendant on a writ of extent.

Other expenses attending the execution of the writ, may also be recovered on application to the court, or a judge in chambers. *The Queen v. Patton*, 307.

Of non-suit, when suit settled by

third party.—3. After trial of an ejectment brought upon a mortgage, at which leave was reserved to move for a nonsuit, the suit was settled and the cost paid by a third party, interested as an after mortgagee of the same property. The costs were paid without the defendant's authority.

Held, that this payment could not affect the defendant's right to recover costs from the plaintiffs in case a nonsuit should be ordered; and, consequently, the defendant having moved for a nonsuit, that it was still necessary to determine the point reserved at the trial. *Doe dem. Morgan et al. v. Boyer*, 318.

COVENANT.

To repair, in consideration of exemption from rent, within what time to be performed.—See "Lease," 3.

To indemnify against a charter party generally and without exception.—*Construction of.*—*Bankruptcy and certificate.*—The plaintiff Jones, had chartered a boat called the "Favorite," of Mr. Cayley, for several years. Before the expiration of this charter, a co-partnership was formed between the now plaintiff and the now defendants. When this co-partnership was dissolved there was still a year to be run of the above charter; and the plaintiff and the defendants entered into an agreement whereby the defendants undertook to assume the above charter for the time unexpired, and to pay "F. M. Cayley, Esq., the sum of 360%, for the use of said steamer for the year 1847, (the remaining year of the charter), and shall and will deliver up to the said R. Jones, or to the said F. M. Cayley, the said steamer 'Favorite,' on the expiration of the said charter, or otherwise account to the said Jones or to the said Cayley, for the value of the said boat; and *generally and without exception*, shall and will save

the said R. Jones harmless therefrom, and from the *said charter*, and from all the obligations thereof."

Held, that though the words "*generally and without exception*" did literally amount to an undertaking to save plaintiff harmless from *any* demand under the charter party, yet that, when taken in connection with the prior agreement (set out in the statement of the case) for this covenant they would mean *rather without exception as to the description of claim*, than as to time; and that the defendants would be liable only for moneys accruing due under the charter party during their co-partnership, and thence to the expiration of the charter.

Held also, that the defendants were not discharged from their covenants by their bankruptcy and certificate.

Jones v. Walker et al., 136.

Covenant to repair, action on, against assignee of the rent.—2. Plaintiff sued defendants, who were the assignees of the rent for the term which plaintiff was to enjoy, on a covenant by his lessor to repair, as being a covenant running with the land; but *held*, that defendants not being assignees of the reversion for any term or time, were not liable on the covenant. *McDougall v. Ridout et al.*, 239.

Covenant for title, when action will not lie.—3. An action will not lie on the covenant for title in a deed of bargain and sale, when it is shewn that the grantor had a good title at the time of conveying, although the plaintiff experienced a delay and expense in getting into possession. *Carr v. Dunn*, 246.

Rights of assignee and surety—Implied covenant.—4. The plaintiffs were sureties to the defendant for the performance by C. of an agreement whereby C. covenanted for himself, his executors, administrators and assigns, to build certain cottages for

the sum of 1800*l.*, which the defendant covenanted to pay to C. his executors, administrators and assigns in the following manner : 800*l.* to be advanced during the progress of the work, and the remaining 1000*l.* to be paid on the completion of the agreement, by the conveyance to C. of certain specified premises. C. failed to perform his contract, and assigned it to the plaintiffs, having received 800*l.* on account. It was not shewn that the defendant was any party to the assignment.

The plaintiffs and defendant then entered into an agreement (to which C. was no party), reciting C's previous contract ; the plaintiffs' liability as sureties for him ; his non-performance and assignment to the plaintiffs ; that the defendant at the plaintiffs' request had agreed to give further time for the completion of the contract ; and that in consideration of the premises the plaintiffs covenanted to finish the work according to the first agreement ; and the parties mutually bound themselves in 1000*l.* for the performance of this last agreement.

Held, that there was no covenant, either express or implied, on the part of the defendant to convey to the plaintiffs, or to pay them 1000*l.* (Robinson, C. J., *dissentiente*.) *Hall & Platt v. Gilmour*, 492.

CROWN.

Power of crown to cancel sale to vendee after receipt.]—1. The plaintiff in 1846 purchased some clergy reserve land from a government agent and obtained receipts for partial payment. The defendants were then living on the land, and had been living there since 1840, having made valuable improvements. On the 2nd of August, 1849, an order of council was made, that on the defendants making the required payments, the plaintiff's money should be returned to him, and

the sale to him cancelled. When the present action was brought, an order of the Executive Council was made on the 6th August, 1850, recommending that the Attorney General be authorized to defend the suit.

Held, that at the time the plaintiff received his first receipt from the government agent, defendants being mere intruders on crown lands, he acquired a right to eject them under 12 Vic. ch. 31, sec. 2 ; and that the crown could not at its pleasure divest him of that right, nor change a wrongful occupant into a rightful occupant, to the prejudice of their own vendee. *Doe dem. Henderson v. Seymour*, 47.

Construction of 4 & 5 Vic. ch. 10.]—2. Soil and freehold of roads, laid out under 4 & 5 Vic. ch. 10, does not vest in the crown. *Cæsar v. Norton*, 100.

CROWN GRANTS.

Cannot be under seal at arms.]—1. A grant of lands, in 1784, by the then Governor of the Province of Quebec, and under his *seal at arms*, to the Mohawk Indians and others, conveyed no legal estate : *first*, as not being by letters patent under the great seal ; *secondly*, for want of a grantee or grantees capable of holding. *Doe dem. Sheldon v. Ramsay et al.*, 105.

Letters patent—Inconsistent description of land granted.]—2. In a patent the land granted was described as "a certain parcel of land in the township of Niagara, containing by admeasurement thirty-five acres, be the same more or less, which said thirty-five acres of land are butted and bounded as follows," &c. It appeared that the boundaries given would embrace about seventy acres, including several lots in the town of Niagara. (From the facts proved it was clear that this was not the intention of the government in making the grant.)

Held, first that the description of the land as in the township of Niagara coming first, must govern, and the boundaries be regarded as erroneous, and therefore that no land could pass which at the granting of the patent was included in the town.

Secondly, it being shewn that in patents bearing date both before and after that to the defendant, the lots claimed by him were declared to be set apart as clergy reserves: that such declaration was conclusive as against the crown and would prevent the land so appropriated from passing to the defendant, independently of the first objection. *Doe dem. Campbell v. Crooks*. 639.

DAMAGES.

Measure of for refusing to transfer shares.]—See “Joint Stock Companies.”

DEBT.

See LEASE, 1.

DEED.

See PARTNERSHIP.

Inconsistent description of land granted.]—See “Crown Grant,” 2.

Registry—To gain priority a valuable consideration must be shewn—Release inoperative.]—1. A, in 1842 conveyed to B.’s son, then a minor. This deed was never registered. B, swore that he bought the land from A., but being in difficulty he had the deed made to his son: that he had always continued in possession, but upon this point the evidence was contradictory. A.’s heir in 1849 made a deed of release to B., and B. conveyed to lessors of plaintiff. Both these deeds were registered. *Held*, that there being no evidence that the deed from A.’s heir to B. was for valuable consideration, B. could not displace his son by reason of the prior registry of that

deed; and for the same reason, the lessors of the plaintiff could not claim to be preferred. *Held*, also, that the deed from A.’s heir to B., being a mere release, and (if B.’s son were in possession) there being no estate on which it could take effect, was inoperative. *Doe Prince et al. v. Girty*, 41.

Construction of, when habendum repugnant to the premises.]—2. By deed of bargain and sale A. M. conveyed to H. M., and to her heirs and assigns, certain freehold premises, to hold the same, to the said H. M. her heirs and assigns, “so long as she remains the widow of H. M., but should she marry or decease, the above described land will become the property of the two sons of the said H. M.,—C. M. and J. M.,—forever.” Covenants of title were added to the said H. M., her heirs and assigns.

Held, that the words in the *habendum* constituted a limitation and not a condition: that such limitation was void, as being repugnant to the grant in the premises; and that the grantee took a fee simple. *Doe dem. Meyers et al v. Marsh*, 242.

DE INJURIA.

When proper.]—Declaration on a note made to K. payable to defendant. or order and by defendant indorsed to plaintiff.

Plea—That the note was made by K., and indorsed by defendant to the plaintiff to enable the plaintiff to raise money upon it to be delivered to K., with which money K. was to buy wheat and to manufacture flour from it, which flour was to be consigned to the plaintiff, that he might raise money thereon for retiring the note: that the said note was indorsed, the money raised, the wheat bought and the flour made from it consigned to the plaintiff for the said purpose: that the plaintiff sold the flour, and with the proceeds paid the note when due; and that the

defendant received no value for the note except as aforesaid.

The Court held the above defence to be matter of excuse, and not in discharge and thereof that a replication *de injuria* was good. *Richardson v. Phippen*, 255.

DEMAND OF POSSESSION.

See LEASE, 4.

DISTRICTS.

Effect of 12 Vic ch 78, on names of corporations.] *Held*, that the act abolishing districts does not take away from the defendants the name given to them by their charter. *Hughes v. The Mutual Fire Insurance Company of the District of Newcastle*, 387.

DIVISION COURT.

See MANDAMUS.

DOWER.

Of married woman in lands of her first husband—How released.]—1. Action for dower by T. H. and S. H. his wife in lands of the former husband of S. H. The defendant pleaded a release by S. H. after action brought, and an examination and certificate by two justices of the peace, according to the provisions of 3 Wm. IV. ch. 9.

Held, on demurrer, plea bad; for that statute is not applicable to this case, but the examination and certificate should have been such as are required by the 37 Geo. III. ch. 7, or the 50 Geo. III. ch. 10.

And *quære*, whether a release without the husband's concurrence could in any case be effectual to bar the action. *Howard v. Wilson*, 450.

Dower—Reference to arbitrators to assign—Pleading.]—2. Action of dower. The tenant pleaded a reference to arbitrators and an assignment

by them of certain specified land, of which the demandant had notice, and averred that he had always been, and still was ready to abide by such assignment.

Held, on demurrer—Plea bad, for not shewing that the assignment had been actually made. *McLean v. Horton*, 685.

DUTIES (IMPORT.)

See EVIDENCE, 3.

EASEMENT.

Prescription—Right claimed bad for uncertainty 10 & 11 Vic. ch. 5.]—Wherever a right to interfere with the natural course of a stream is attempted to be founded upon prescription, the exercise of such right must be shewn throughout the period (with the exception of which the statute allows to the full extent claimed, *McKenzie et al. v. McKeyes*, 563.

EJECTION.

Setting aside judgment against casual ejector.]—1. The judge in chambers having made an order to set aside the judgment which had been entered up against the casual ejector for irregularity, the judgment roll having no *placita* or continuances entered on it: *Held*, that judgment should not have been set aside for want of them; and order rescinded. *Doe dem. Connors v. Roe*, 82.

Production of consent rule.]—2. Plaintiffs at the trial were nonsuited for not confessing lease, entry and ouster. Subsequently to the trial the defendant executed a cognovit, *Held per Cur.*, on motion for a new trial, that the defendant's having confessed judgment was a waiver of any formal exception he might have; and moreover that it was not necessary for the lessor of the plaintiff to produce

the consent rule at the trial. *Doe dem. Kerr & Kerr v. Schoff*, 180.

Notice under 14 & 15 Vic. ch. 114, describing part defended for—effect of.—3. Where in ejectment the defendant in his notice described the land for which he intended to defend as *a part of the lot mentioned in the writ*, he was not allowed to contend at the trial that what he defended for was not included in such lot, and therefore not the property of the plaintiff. *Darling v. Wallace*, 611.

ELECTION.

See COMMON SCHOOLS, 2.

Contested election—Notice of disqualification—New evidence.—It is not necessary that the statement of facts placed before a judge when a municipal election is questioned, should contain all the grounds on which the relator relies to entitle him to the seat, if the election should be set aside. If there be a disqualification rendering a candidate ineligible, proper notice of it must be given at the time of election.

No new evidence will be received by the court on the examination of a decision of a Judge in Chambers as to a contested election. *Semble*, (per C. J.) that whether the court, or a judge before whom a relator brings his case, will go further than declare the election of the defendant void, or will proceed as well to seat the relator, is a matter of discretion not to be interfered with on appeal. *The Queen ex rel. Clark v. McMullen*, 467.

ESCAPE.

Liability of constable for.—*Quære* whether a constable can be compelled to execute a warrant of attachment sued out in a County Court from a commissioner, as it is not directed to him but to the sheriff, and the statute gives him no fee. But if he undertakes the service and arrests the defendant he is liable for an escape. *Story v. Durham*, 316.

ESTATE.

See DEED, 2.

ESTOPPEL.

See COMMON SCHOOLS, 1.—FRAUDS (STATUTE OF), 1.—MESNE PROFITS.—PARTNERSHIP.—PRINCIPAL AND SURETY.

Defendants entering under a lease estopped from denying its execution.—See “Lease,” 2.

Defendant giving indemnity bond to sheriff, reciting the seizure of his goods, not estopped from denying his property in them.—See “Sheriff,” 2.

Defendant estopped from disputing plaintiff's title.—It was proved that the defendant went into possession as assignee of a person to whom the plaintiff had given a bond for a deed that he had received indulgence as to the payments required by the bond : that he had expressly promised to go out of possession if such payments were not made ; and that he was in default. This bond was in the defendant's possession, and he had received notice to produce it.

Held, that under these circumstances, the defendant could not dispute the plaintiff's title ; and that the bond not being produced, no secondary evidence was required of its contents. *Doe dem. Lount v. Simpson*, 544.

ETOBICOKE.

Allowance for road at west end of.—See “Trespass,” 1.

EVIDENCE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.—ARBITRATION AND AWARD, 2.—BANKRUPT AND BANKRUPTCY, 2.—CARRIERS.—INFORMATION.—TROVER.—WILL, 3.—WITNESS.

Possession, how far primâ facie

evidence of seizin.—1. A. in 1842 conveyed to B's son, then a minor. The deed was never registered. B. swore that *he* bought the land from A. but being in difficulty had the deed made to his son : that he had always continued in possession ; but on this point the evidence was contradictory, A.'s heir in 1849 made a deed of release to B., and B. conveyed to lessors of plaintiff : both these deeds were registered. *Held*, that the mere fact of B. being in possession when he conveyed to the lessors of the plaintiff could not be relied on as *primâ facie* evidence of seizin, after A. had been shewn to have been in possession previously, and to have conveyed to B.'s son. *Doe Prince et al. v. Girty*, 14.

Of registered title.—2. The production of the register's book in which a memorial is recorded is good evidence of the title being a registered title. And *Semble*, that the registrar producing an examined copy taken from his book without bringing into court either his book or the memorial, would be good evidence. *Ib.*

Import duties not included in contract—Evidence of usage of trade.—3. Plaintiffs bought from defendant certain coal shipped, to defendant at Toronto from a foreign port, and then lying on board the vessel in the Welland Canal. A sale note was given, stating only the quantity and price, and the time by which it was to be taken out of the vessel.

Held, that defendant was not obliged to pay the import duties.

Held also, that evidence was rightly admitted to shew the usage of the trade on sales made under such circumstances. *Brown & McDonell v. Browne*, 312.

Witness, when sworn, bound to produce papers, though not served with subpoena.—4. Assumpsit for work and labour. The plaintiffs' witness

swore that the work was done upon a written agreement, which he had in court, but refused to produce. He had not been subpoenaed.

Held, that the witness was as much bound to produce the writing as if in attendance under a *subpoena duces tecum*.

But *semble*, that if the witness had been required by the court to produce the agreement and had still refused, this would not have been sufficient to warrant the reception of secondary evidence. *Farley et al. v. Graham*, 438.

Deeds—agreement to admit—Witness absenting himself.—5. The defendant's attorney, being the subscribing witness to certain deeds, was asked before the trial by the attorney for the plaintiff to admit their execution. He said that he would do so when put into the box, but insisted on being called as a witness. While the jury were being called for the trial of the cause, he absented himself from the court, and did not return.

Held, that the deeds could not be received as proved on evidence of such agreement to admit ; and *quære*, whether it would have been sufficient to warrant the reception of proof of the witness's handwriting ? The plaintiff, however, shewed himself entitled on other evidence to part of the land claimed, and the court refused to disturb the verdict for the whole. *Doe dem. Wilkins v. Moore et al.*, 445.

Parol evidence not admissible—Account stated.—6. "For value received, I promise to pay James McQueen and Jacob McQueen, or their order, the sum of 102*l.* 15*s.* cy., to be paid in yearly proportions."

Held, first—That the above writing was evidence of an account stated, though the money was not to be payable immediately.

Second/y—That the effect of it was to give two years for payment.

Thirdly—That no parol evidence could be admitted of an agreement that the money should not be payable for four years, or until after the death of the plaintiffs' father. *James McQueen and Jacob McQueen v. Hugh McQueen*, 536.

Statute passed reversing attainder except as to lands already forfeited and sold—Effect of, on proof required from parties claiming under the traitor.—7. A statute was passed reversing the attainder of A. S., and taking away the forfeiture wrought thereby, so far as it might affect such portions of his estate as had not been already declared forfeited, and been sold under authority of law, and vesting such estate in those who could claim it if he had not been attainted: provided always, that nothing in the act contained should affect any property sold or conveyed by the Commissioners of Forfeited Estates, or any public officer acting for the Crown in that behalf, but that such property should remain as if the act had not been passed. In the preamble it was recited that a part of the estate had been taken upon inquisition, and seized by the Crown.

Held, that the plaintiff claiming as devisees of A. S. must shew, as part of their case in the first instance, that the lands claimed were not part of those forfeited and sold. *Doe. Stevens et al. v. Clement*, 650.

EXECUTION.

See TRESPASS, 6.

EXTENT (WRIT OF.)

See COSTS, 2.

FALSE IMPRISONMENT.

Ca. sa. set aside for irregularity, liability of defendants.—1. Trespass for false imprisonment. Plea of justification under a writ of *ca. sa.*

Replication—That the said writ was—after the issuing thereof, and before the commencement of this suit—ordered to be set aside by order of the judge of the County Court: 1st. because it did not issue within a year and a day after judgment; and 2ndly, because the *fi. fa.* was not returned within a year and a day from its issuing.

Held, on special demurrer, that though these were good grounds to set aside the writ, yet they did not leave the defendants liable. *McCarthy v. Perry et al.*, 215.

FENCES.

Action for not repairing.—In an action on the case the second count of the declaration averred, that the plaintiff and defendants were possessed of adjoining closes, and that *by reason of their possession* it became the duty of the defendants to keep in repair the division fence; and in a third count it was charged that the defendants for the same reason were bound to keep in repair half of the said fence.

Held, on demurrer, both counts bad, as shewing no facts from which the duty alleged would accrue.

Quære, whether, since the passing of 8 Vic. ch. 20, an action like the present will lie. *Otto v. Pelan et al.* 363.

FOREIGN JUDGMENT.

Assumpsit on—Pleading.—1. The first count of the declaration was on a judgment on the Superior Court of Montreal. Defendant pleaded that *he was not at any time served with any process* issuing out of the said court at the suit of the plaintiffs for the causes of action for which the said judgment was obtained; nor *had he at any time notice of any such process*; nor did he appear in the said court to answer the said plaintiffs.

Held bad, on demurrer, inasmuch

as the pleading did not shew that the proceedings were so conducted as to deprive the defendant of the opportunity of defending himself. *Montreal Mining Company v. Cuthbertson*, 78.

FORFEITURE.

See DEED, 2.—INDIANS.—INQUISITION.

FRAUDS (STATUTE OF.)

Sale of goods—Estoppel.—1. A. by artifice obtained an order from B. directed to his agent, to deliver a certain amount of wheat to A. which order A. presented not to the agent but the defendant, a wharfinger, in whose warehouse there was wheat belonging to B. The defendant thereupon gave him his certificate or *bon* for the wheat deliverable on demand. The defendant shortly after learned how the order had been obtained and B. being dissatisfied with him for having given such a certificate, the defendant notified A. that he would not deliver the wheat to him; whereupon A., it was alleged, transferred his right to the wheat to the plaintiffs, though there was no indorsement or transfer of defendant's certificate to plaintiffs, the wheat was subsequently demanded of the defendant who refused to deliver it, but it did not appear that the person who demanded it shewed any authority from the plaintiffs to do so, or that the defendant ever knew of the alleged transfer to plaintiffs, or of their having any interest whatever in the wheat. Plaintiffs brought trover; and it was *held*, that the alleged sale to the plaintiffs was void under the Statute of Frauds; and that the defendant was not estopped by his certificate from denying plaintiffs' title.

Semble, that A. had no power to sell the wheat to plaintiffs, he not having an undisputed control over it himself. *Davis et al. v. Browne*, 193.

Promise to pay the debt of another—Consideration not expressed.—2. A. deceased, was indebted to B., who had taken certain securities for the debt; C. on receiving these securities gives B. the following agreement: This is to certify that I, C., do agree to settle all accounts against the estate of A., deceased, hereinafter mentioned; that is an unsettled account between B. and A., and one note of hand held by D. against the said A. and one note held by E. against B.

Held per Cur., not a case within the Statute of Frauds; therefore an action will lie, though no consideration is mentioned for the promise. *Gerow v. Clark*, 219.

Not applicable to agreement pleaded by defendant.—3. In trover for a deed, it was held that an agreement that the plaintiff should deliver the deed to the defendants to be returned on certain conditions, was not affected by the Statute of Frauds, at least, when pleaded by the defendant.

Dowling v. Miller, 227.

GUARANTEE.

Discharge of.—Where the defendant became surety to the plaintiff for the rent of a certain piano, hired to one H., and for its return on request; and the plaintiff afterwards sold the piano to H., taking in security a bill of exchange on England, with the understanding that if the bill should be dishonoured the sale was to be void. *Held*, that by such agreement the defendant was discharged from his guarantee. *O'Neill v. Carter*, 470.

ILLEGALITY.

See SUNDAY.

Promissory note—Illegal consideration.—An agreement not to proceed in a prosecution for permitting unlawful gambling in a tavern is an illegal

consideration for a promissory note.
Dwight v. Ellsworth, 539.

INDEMNITY BOND.

See SHERIFF, 2.

INDIANS.

Chief acting for tribe.]—*Held*, that the mere fact of a chief of an Indian tribe assuming to act as a duly authorized agent, in the name and on behalf of the tribe, shewed no power in him so to act; and therefore a lease signed by him as agent, &c., conveyed nothing. And, consequently, that such lessee had no estate which, on his being subsequently attainted of high treason could be forfeited to the Crown, and vest in the Commissioners of Forfeited Estates, under 59 Geo. III. ch. 12. *Doe dem. Sheldon v. Ramsay et al.*, 105.

INDICTMENT.

See CERTIORARI.

INFORMATION.

For intrusion—Effect of the general issue “per stat.”]—Information for intrusion. Plea “not guilty,” with the words “per stat,” in the margin. The Crown gave evidence of their title commencing within twenty years before the information brought, but gave no further proof of the trespass and intrusion, and the defendants gave no evidence. *Held per Cur.*, that a general verdict could not be entered for the Crown. *Semble*, that the Crown was entitled to a writ of *amoveas manus*. *Attorney General v. Stanley et al.*, 84.

INQUISITION.

Void for uncertainty—Conveyance by commissioner founded on.]—Though by the 33 Henry VIII. ch. 20, the

4 u—VOL. IX. Q.B.

Crown, in case of attainder for high treason, would be deemed in actual possession without any inquisition of office, yet such lands only would vest in the commissioners under 59 Geo. III. ch. 12 as should be found by inquisition to be vested in the Crown, and therefore no more land could possibly pass by a deed from the commissioners than the inquisition had found the traitor seized of.

And *held*, that the inquisition could not support the conveyance which the commissioners made; for it referred to nothing which could supply proof of identity, and the commissioners were not warranted in going beyond the inquisition.

And *semble*, that the inquisition was void for want of certainty. *Doe dem. Sheldon v. Ramsay et al.* 105.

INSOLVENT & INSOLVENCY.

10 & 11 Vic. ch. 15—*Answers to interrogatories may be contradicted.*]—Where a defendant applies for his discharge under 10 & 11 Vic. ch. 15, this court, or a judge before whom such application is pending, may receive affidavits from the plaintiff contradicting the answers to interrogatories, or shewing that they cannot be true. *Clarkson v. Hart*, 348.

INSURANCE.

Insurance—Liability of agents in effecting, and for the efficiency of the captain and crew.]—The plaintiff entrusted the defendants, as commission agents, with a quantity of flour either to sell for him at Toronto, or to send it to be sold at Quebec, or other places, as circumstances might require. He directed that the flour should be insured, and the defendants effected an insurance with the British America Insurance Company. The flour was shipped by the defendants at Port Credit, consigned to Messrs. G. & Co.

at Quebec.¹² Owing to the negligence and want of skill of the captain, and of a pilot who was taken in at Kingston, the vessel was stranded in the St. Lawrence, and the cargo lost. The policy contained an express stipulation that the company would not be liable for any loss occasioned by the want of ordinary care or skill in the navigation of the vessel, and the plaintiff therefore failed to recover on it; but it appeared that this was the ordinary form of policy, and that the defendants could not have procured any other.

Held, that the plaintiff could maintain no action against the defendants for taking such a form of policy; and that in the absence of any ground for suspicion, it was not their duty to inquire into the skill and experience of the captain or crew of the vessel.

And *semble*, that if an insurance might have been effected on more favourable terms, yet the defendants would have been justified in insuring as they did, having received no special instructions, and the company being one with which such insurances were usually effected by the trade. *Silverthorn v. Gillespie et al.*, 414.

INTEREST.

In an action on a judgment.]—*Quære*, whether, under 2 Geo. IV. ch. 1. a plaintiff is entitled to interest from the time of entering judgment, where he does not enforce such judgment by execution, but brings a second action upon it after a lapse of several years. *Eberts v. Traveller*, 355.

INTRUSION.

See INFORMATION.

JOINT STOCK COMPANY.

See MARMORA FOUNDRY COMPANY.

Action against, for refusing to transfer stock.]—In an action against

a harbour company, for refusing to register a transfer of stock by one S. to the plaintiffs.

Held, that although S., being president of the company, might perhaps have registered the assignment himself, yet that the refusal of the secretary to do so formed a good ground for an action against the company.

Held also, that the company had no legal lien on the stock for harbour tolls due by S. to them, and could not therefore on that ground refuse to register the assignment.

Held also, that registration in the books of the company was necessary in order to complete the transfer.

Held also, as to four shares, of which there appeared only an entry of credit to S. in a ledger, but which were not standing in his name in the stock-book, that the plaintiffs were not entitled to recover in respect of such shares.

Held also, as to the shares for which the plaintiffs were entitled to recover, that they were strictly entitled only to their value at the time of demand and refusal to transfer; but the jury having allowed a larger sum, and this question not having been pressed on the argument, the court did not reduce the verdict. *McMurrich et al. v. The Bond Head Harbour Co.*, 333.

JUDGE OF THE DIVISION COURT.

See MANDAMUS.

JUDGMENT.

See FOREIGN JUDGMENT.

Registration of, to bind lands—Elegit.]—The meaning of the 13th section of 9 Vic. ch. 34 is, that judgments shall bind lands from the date of their registry, not with reference only to remedy by *elegit*, but for the purpose of sale under a *fi. fa.* *Doe*

dem. R. & J. W. Dempsey v. Boulton, 532.

JUSTICES OF THE PEACE.

See MAGISTRATES.

JUSTIFICATION.

Under a warrant of distress—When defendant's motives may be enquired into.—See "Trespass," 6.

LAND.

How taxed under 4 & 5 Vic. ch. 10.—See "Municipal Corporations," 9, 10.

LAW SOCIETY.

See ATTORNEY, 1.

Power to make by-laws imposing term fees.—*The Law Society v. Dougall et al.*, 541.

LEASE.

See COVENANT, 2.—NOTICE OF INTENTION TO QUIT.

Under lessee of part of the term sued as assignee of the whole.—1. In debt for rent on a lease, the declaration stated "that the right and interest of the lessee in the demised premises came by assignment to, and was vested in the defendant." It was in evidence that defendant was at most only underlessee for a part of the term.

Held per Cur., that a nonsuit was rightly directed. *Lawler v. Sutherland*, 205.

Non-execution by lessor—Estoppel.—2 A declaration in covenant stated that, by indenture made between the plaintiffs and defendants, the plaintiffs demised to the defendants the tolls authorized by law to be received upon a certain turnpike road, for the term of

one year : that the defendants covenanted to pay a certain rent therefor; and that, *by virtue of the said demise, the defendants entered and were possessed for the term so to them granted.* Breach, non-payment of the rent.

Held, on demurrer, that the defendants were estopped from denying the demise, and were bound by their express covenant to pay the rent ; and that the non-execution by the lessors, under such circumstances, was no defence.

And that they were also estopped from alleging the want of a common seal of the plaintiffs to the lease, or from pleading that they had no authority to demise.

Held also, that a plea that the said indenture was not signed by the plaintiffs, or by any agent of theirs authorized in writing, was bad. *The Municipal Council of Frontenac, Lennox, and Addington v. Chestnut et al.* 365.

Covenant to repair, &c., in consideration of exemption from rent—Within what time to be performed.—3. R. leased to C. certain premises for eight years. C. covenanted that he would, at his own charge, place the land and premises in good order : that he would build a new stable, &c., and would repair and keep repaired the fences and gates then erected, or that might be erected during the term : on account of these improvements and additions it was agreed that no rent should be paid for the first nine months.

Held, that the lessee was not obliged to perform his covenant within the time for which he was relieved from rent.

And quere, whether he should have the whole term to do the work, or must be held to have agreed to do it within a reasonable time. *Castle v. Rohan*, 400.

Construction of—"Lease and to farm let," effect of—Demand of pos-

session.]—4. Covenant on an indenture, whereby the defendant “leased and to farm let” to the plaintiff certain premises at a yearly rent; the crops in the ground, and the stock and implements of husbandry, to be valued on the day of entry, and to be taken by the plaintiff at such valuation. The plaintiff demanded possession of the defendant at a tavern not on the premises, but the defendant refused to give it, unless he was paid or received security for the value of the crop and stock, &c.

Held, that the defendant was justified in such refusal under the terms of the lease; and *quære*, whether if the lease had been without any stipulation, the demand of possession made would have been sufficient.

Quære also, whether the words “lease and to farm let” imply a covenant to give possession on the day when the term is to commence. *Harvey v. Fergusson*, 431.

LEAVE AND LICENSE.

By parol, when revocable or assignable.]—W. G., owning lot 24, obtained a parol license from the plaintiff (owner of lot 25) to erect a dam across a stream running from lot 25 through lot 24, and thereupon erected a dam; and in further consequence of such license built a mill on said lot, to be worked by means of said dam. The defendant purchased the lot, mill, &c., from W. G., and for the purpose of working the mill upheld the said dam, and thereby overflowed plaintiff's land. Plaintiff brought his action, and defendant pleaded the license to W. G., and that he (defendant) having purchased the lot, &c., from W. G., for the purposes, &c., upheld the said dam, &c.

Held, on demurrer (Robinson, C. J., *dissentiente*), plea bad, 1st. Because the license, being coupled with the grant of an easement, the grant not

being by deed, was void, and the license consequently revocable. 2ndly. Because it was a license, for all that appears, given to W. G. personally, and being revocable was not assignable. 3rdly. Because the right to overflow the plaintiff's land was claimed as incidental to the possession of the mill on lot 24; but the plea did not shew the right to form such an incident, either by the manner of its creation or otherwise. *Beaver v. Reed*, 152.

Case for overflowing land—License not proved.]—2. Case for overflowing land of the Canada Company. The defendant produced a letter to one S. under whom he claimed, from the plaintiff's agent, saying that the land would be sold to him for the purpose of erecting a saw mill, on certain specified conditions—two of which were, that the mill should be in operation within twelve months, and that he should furnish the company, or their settlers, with lumber at a reasonable rate.

Held, that this letter could not be construed as a license to the defendant to overflow the plaintiffs' land to any extent necessary for working his mill, without clearly shewing that the probable effect of building the mill and putting up the dam was known to and contemplated by the parties at the time.

Held also, that the plaintiffs, as a corporation, could not be bound with respect to such an injury as was shewn in this case, by anything done by their ordinary agents without special authority. *Canada Company v. Pettis*, 669.

LIEN.

For harbour tolls.]—See “Joint Stock Company.”

LIMITATIONS (STATUTE OF.)

Exception in, 4 Wm. IV. ch. 1, sec.

17.]—1. The effect of the exception, 4 Wm. IV. ch. 1, sec. 17, in favour of a grantee of the crown who has never gone into possession, is that while ignorant of the fact of his land being in possession of some other person he is not to be regarded as disseized, and consequently is in a condition to devise. *Doe dem. McGillis et al. v. McGilvray et al.*, 9.

2. The proviso in that clause will prevent the operation of the statute against any person entitled to land as the grantee of the crown, who has not exercised acts of ownership or had knowledge of any person being in possession, even though it should appear that he was unconscious of his title, and believed that he had disposed of his land. *Doe dem. Pettit v. Ryerson*, 276.

Construction of sec. 17 of 4 Wm. IV. ch. 1—Discontinuance and adverse possession.]—3. The plaintiff, being the patentee of a 200 acre lot, sold to one T. the rear 50 acres, and afterwards "the front of three quarters" to one K. Supposing that he had parted with all his land he moved off the lot: it turned out however that, owing to an error in running the lines, a small surplus not covered by the deeds, was left between the parts sold: and after a lapse of more than thirty years the plaintiff brought ejectment to recover this portion.

Held, that to enable the Statute of Limitations to run, it was not necessary that K. should have taken possession, imagining that he had bought all not sold to T., and intending therefore to claim and possess the part in question; but that it should have been left to the jury to say whether the plaintiff, having been in possession of the rents and profits, had not discontinued such possession, and whether such discontinuance of not more than twenty years before action brought. *Doe dem. Taylor v. Proudfoot*, 503.

21 Jac. 1. ch. 16.]—Whenever a plaintiff comes within the jurisdiction the Statute of Limitations begins to run, and he cannot urge as an excuse that he did not remain long enough to sue. It is not necessary to shew that the defendant was also within the province when the plaintiff came, unless such issue is expressly raised. *Torrance et al v. Privat*, 570.

MAGISTRATES.

Liability of for not returning conviction.—1. Justices of the peace, before whom a conviction is made are not *jointly* liable, under 4 & 5 Vic. ch. 12, for not returning the same. A declaration charging that the return was not made to the *next ensuing Quarter Sessions* of the Peace, is bad—the statute requiring a return to the next ensuing *General Quarter Sessions*. *Metcalf qui tam. v. Reeve & Gardner*, 263.

Protection against costs—4 & 5 Vic. ch. 26, sec. 40, *not repealed by 14 & 15 Vic. ch. 54.*]—2. *Held, first*, That the facts of this case were such as to entitle the defendant to the protection afforded by 4 & 5 Vic. ch. 26. *Secondly*, That the privileges extended by that statute to justices, as regards exemption from costs, are not cancelled by the late act 14 & 15 Vic. ch. 54. *Keeley et ux. v. Raile*, 666.

MALICIOUS ARREST.

Proof of malice necessary.]—After bailable *ca. re.*, sued out and placed in the sheriff's hands, defendant settled the suit in full; he was afterwards taken on the writ, and thereupon brought an action for malicious arrest.

He'd, not maintainable without proof of actual malice. *McIntosh v. Stephens*, 235.

MANDAMUS.

See MUNICIPAL CORPORATIONS, 5, To the judge of the Division Court, refused.]—A. was defendant in the Division Court in a suit brought to try the right to a picture seized under execution, and which he claimed. Being absent when the cause was called on, judgment was given against him; and he obtained a new trial on paying into court the amount for which the picture was seized to abide the event of a trial. A verdict was afterwards given against him. On applying for the money, he found that it had been paid over to the execution creditors. He then enquired for the picture, but it had been seized and sold under other executions.

Under these circumstances, a rule was moved for a mandamus to the judge of the Division Court to make an order on the clerk to pay to A. the sum deposited, but the court held that they could not interfere. *In re Crookshank, 677.*

MARMORA FOUNDRY COMPANY.

May sue shareholders for calls.]—By the Marmora Foundry Act, 1 W. IV. ch. 11, it is provided that the stock subscribed for “shall be due and payable to the said company” in the manner mentioned in the act; and that in case of neglect or refusal to pay the instalments due on shares, such shares shall be forfeited and sold.

Held, (in accordance with the Court of Common Pleas,) that the company were not restricted to the remedy by forfeiture; and that they might maintain an action against a shareholder upon calls of stock subscribed. (*Draper, J., dissentiente.*) *Marmora Foundry Co. v. Jackson, 509.*

MESNE PROFITS.

Judgment in ejectment replied as

estoppel.]—In an action of trespass for mesne profits, a judgment recovered in ejectment for part of the premises is an estoppel against the defendant’s denial of the plaintiff’s interest in such portion. *Doe v. Langs, 676.*

MONTREAL MINING COMPANY.

Liability for calls on shares—By-law imposing penalty for not paying—Pleading.]—Assumpsit for calls on certain shares in the stock of the said company. *Plea*—that defendant was not at the time of action brought, nor is he the holder of the said shares, or any of them: *Heid*, bad on demurrer, inasmuch as it assumed that if a person ceased to be a stockholder after the call was made he would no longer be liable; whereas the provision in the statute 10 & 11 Vic. ch. 68, sec. 13, is expressly otherwise. *Montreal Mining Company v. Cuthbertson, 79.*

MORTGAGE

See USE AND OCCUPATION, 2.

Registration of chattel mortgages—12 Vic. ch. 74, not applicable to terms of years in real estate.]—K. being in possession of certain premises under a lease for six years, assigned his term by way of mortgage to one R. This assignment was registered in the County Court. K. continued in possession for some time after this assignment until R. entered. The defendant purchased from R. and went into possession. The assignment to R. was never re-filed; more than a year after its original filing the unexpired term was sold by the sheriff under an execution against K. and the purchaser brought ejectment.

Held, first, that the 12 Vic. ch. 74, applies only to mortgages of movable goods, and that there was therefore no

necessity to register the mortgage in this case according to its provisions.

Secondly, that if the mortgage had come within that act it would have been void, not having been kept in force by registry, or accompanied by immediate and continued possession. *Frazer v. Lazier*, 679.

MUNICIPAL CORPORATION.

See ELECTIONS.—PRACTICE.—STATUTE LABOUR, 2.

Release.]—1. *Quære*, whether the release given by the warden to the principal and one of the sureties, as mentioned in the statement and judgment of the court, was binding at law. *Municipal Council of Essex, Kent, and Lambton v. C. Baby*, 34.

Wild lands—How to be taxed.]—2. The Municipal Council of the District of Colborne passed a by-law, imposing a tax *per acre* on unoccupied or wild lands, for the purpose of improving the roads and bridges, and liquidating the debt of the District.

Held, that the by-law was bad, inasmuch as the Council had no power to impose a tax for repairing the roads and bridges generally, nor to confine such tax to unoccupied lands only, nor to impose a tax of so much per acre, instead of an assessment of so much in the pound on the assessed value; and the land having been sold for arrears of such taxes, in addition to arrears which had accrued under the statute.

Held, that the sale was nevertheless void; and that the sheriff's deed was inoperative, and conveyed no title.

Quære, whether the District Council could direct land to be sold for payment of taxes imposed not by the provincial statute but by their by-law. *Doe dem. McGill v. Langton*, 91.

Costs.]—3. When a Municipal Council, on being served with a rule *nisi*, repealed the by-law complained

of, they were still obliged to pay the costs of the application. *In re Coyne v. The Municipal Council of Dunwich*, 309.

By-law to contract loan—Modification of—Objections to the manner of passing by-laws]—4. The court refused a rule *nisi* to quash by-laws of a township council, on the ground that having passed a by-law to contract a loan, they had exceeded their powers in afterwards modifying the said law; it appearing that such alteration could not effect the security of creditors.

Or, on the ground that the said by-laws were passed at a special meeting called by a member of the council, and not by the town-reeve or other authorized officer.

And *semble*, with respect to the last objection, that it is doubtful whether the court has authority under 12 Vic. ch. 81, sec. 155, to quash a by-law for an irregularity in the manner of its being passed, though they might hold it void if relied upon in support of something done under it; and that if they should entertain a motion to quash any by-law on account of an irregularity in passing it, it would rather be under the principles of the common law. *In re Hill and the Municipal Council of the Township of Walsingham*, 310.

Liability of township council for debts contracted by district council.]—

5. K. was employed in 1848 by the trustees of school section No. 4, in the township of Sandwich, acting under a by-law of the district council, to furnish materials for and to erect a school house in that section. Part of the money was paid to him on account, and for the balance he brought an action against the trustees, and recovered judgment. Finding no property of theirs on which to levy, he applied in 1850 to the municipal council of the township, who passed a by-law imposing a rate to satisfy his judgment; this

by-law was afterwards repealed before the money had been collected. It appeared that, under the original by-law of the district council, the rate for erecting the school-house had been levied, and the part not paid over to K. had been handed to the secretary-treasurer of the trustee, who absconded, and that K. was in possession of the school-house, and retained it for the money due him.

Under these circumstances the court held, that the township council were not liable; and discharged a rule for a mandamus to them to pass a by-law for raising money to satisfy the claim.

Semble also, that if the applicant were entitled to recover, an action would lie against the council, and therefore no mandamus should go. *Kennedy v. The Municipal Council of the Township of Sandwich*, 326.

Remuneration of members of township councils.—6. Township councils have no authority to pass by-laws providing for the remuneration of their own members. *In re Wight and the Municipal Council of the Township of Cornwall*, 442.

Power over tavern licenses.—7. Municipal councils have no authority to appoint by their by-laws the persons who are to receive licenses for keeping taverns. *In re Coyne and the Municipal Council of the Township of Dunwich*, 448.

Construction of 14 & 15 Vic. ch. 109, sec. 35.—8. This clause has not a retrospective operation, and the court therefore discharge a rule calling upon the defendants to pay the costs of an application on which a by-law had been quashed before the passing of that act. *Brown v. The Municipal Council of the County of York*, 453.

Quashing repealed by-laws.—9. The court discharged, with costs, a rule for quashing a by-law of a district council, where it appeared that such

by-law had been absolutely repealed before the 12th Vic. ch. 81. *In re McGill and the Municipal Council of the County of Peterboro'*, 562.

By-law repealed and revived—No sum limited—Quashed.—10. A district council passed a by-law imposing a tax on certain lands, but limiting no sum to be raised. By two subsequent by-laws this was repealed and again revived.

Held, that the last by-law must be quashed, notwithstanding that the applicants had paid part of the tax imposed by the first. *The Canada Company v. The Municipal Council of the County of Oxford*, 567.

By-laws passed to impose rates, under 4 & 5 Vic. ch. 10 & 12 Vic. ch. 81—Quashed.—11. By-laws quashed: 1—As contrary to the 4th & 5th Vic. ch. 10, in not limiting the sum to be raised, and in imposing a tax on wild lands alone. 2—As exceeding the authority given to the district councils by the 48th section of that act. 3—As inconsistent with the requirements of 12 Vic. ch. 81, in not specifying the sum required, or the purpose to which it was to be applied, [And *semble*, that it is necessary under this act (sec. 41, sub-sec 22), as it was under 4 & 5 Vic. ch. 10, that the sum to be raised should be specified in the by-law, and then a rate authorized for raising it.] 4—For taxing certain townships for specified sums, without shewing for what purpose the money was required. *Tylee v. The Municipal Council of the County of Waterloo*, 572.

By-laws passed under 4 & 5 Vic. ch. 10—Necessity for statement of the purpose for which money required—Land need not be separately charged, or taxed by the acre.—12. A by-law passed under 4 & 5 Vic. ch. 10, for raising a rate, stated that the money was required to pay off 1500*l.* due to the Gore Bank, and 500*l.* due by the

District to A. D. *Held*, sufficient, and that it was not necessary to state for what services the money was due ; for the court would intend that the debts were legally contracted, and for a legal purpose.

Under the above statute, land must have been taxed at so much in the pound on its assessed value ; and it was not necessary that a by-law should charge upon land separately a distinct proportion of the sum authorized to be levied. *Tylee v. The Municipal Council of the County of Waterloo*, 588.

*By-law—Objections to, not apparent on the face—Mode of imposing rates for county purposes—*12 *Vic. chaps.* 78 & 81—13 & 14 *Vic. chaps.* 64 & 67—14 & 15 *Vic. chaps.* 109 & 110.]—13. It is not necessary that a by-law to raise money for county purposes should contain all the provisions required to perfect the measure ; and, therefore, the same by-law which provides for raising the loan and imposing the rate need not apportion the sums to be paid by each municipality, for that may be provided for by a subsequent by-law.

A by-law imposing a rate for county purposes, to be levied on the *actual* value of all taxable property in the county, is not objectionable, though in villages, &c., the taxes are directed to be levied on the *annual* value, for such direction is intended only to apply to rates imposed for their own purposes.

The court is not bound under the act to quash a by-law, unless it appear to be illegal on the face of it. Where it is attempted to be proved so by extraneous evidence, it may be discretionary with the court, upon such evidence, when acting under their common law jurisdiction, to say whether the by-law shall stand or not. *Grierison v. The Provisional Municipal Council of the County of Ontario*, 623.

NAVIGATION

See CARRIERS—INSURANCE.

NEW TRIAL.

Misdirection on one point.]—1. Where the court differed with the ruling of the learned judge at Nisi Prius on one point, but considered the verdict for the defendant well found on other grounds, they granted a new trial at the option of the plaintiff, on his paying the costs by a certain day. *Doe Prince et al. v. Girty*, 41.

Granted on application of one defendant.]—2. Only one defendant having pleaded, and the other having suffered judgment by default, the court ordered a new trial, where it appeared that, although the rule was moved as on behalf of one defendant only, the other assented to the application. *Kerr et al. v. Gordon and Henderson*, 249.

Conflicting evidence.]—The court are not bound to grant a new trial when there was no misdirection, nor any point of law involved, and where it does not appear that the justice of the case requires it, though the verdict may seem to be against the weight of evidence ; and, under the peculiar circumstances of this case, they refused to interfere. *Doe dem. McQueen v. McQueen et al.*, 576.

NOLLE PROSEQUI.

Informally entered]—Where a *nolle prosequi* as to one defendant was filed only with the clerk at the assizes, the court held that it could not be recognized, and that a rule to reduce the verdict was therefore properly entitled as against both defendants. *Waser v. Taylor and McLean*, 609.

NOTICE OF INTENTION TO QUIT.

Plaintiff leased certain premises to

the defendant for the term of one year, with the privilege of holding the said premises for an indefinite time, on certain conditions; one of which conditions was, that three months' notice in writing should be given prior to leaving the premises, and prior to the termination of a full year, by either party so inclined.

Held, that, by the terms of the above agreement, defendant was bound to give three months' notice of his intention to quit at the end of the first year. *Counterv. Morton*, 253.

NUL TIEL RECORD.

Ven ex.—Amendment refused.—

1. The declaration set out a writ of *ven. ex.*, reciting that the sheriff had been commanded to make of lands tenements, &c.;—his return, that he had taken lands and tenements which remained unsold, &c., and commanding that he should sell the said land and tenements, &c.

Plea, *Nul tiel record*, and issue thereon.

The exemplification produced shewed a writ of *ven. ex.* reciting the sheriff's return—that he had taken goods and chattels, &c., which said remained unsold, &c., and commanding him to sell the lands and tenements. The writ was truly set out in the exemplification.

Held, that no amendment could be allowed, the error being in a material part of the writ itself, and not in the declaration; and that the defendant was entitled to judgment. *Brown et al. v. Carroll*, 314.

When proper.—2. To an action for assault and battery, the defendant pleaded that he had been convicted of the trespass complained of before a justice of the peace, and so released from this action. The plaintiff replied "*nul tiel record*" of the conviction; and the court held the replication good. *Thompson v. Leslie*, 360.

ORDNANCE.

See PLEADING, 4.

PARLIAMENT.

Privilege of members from arrest.]

—1. Members of the provincial parliament in Upper Canada have the same privilege from arrest as members of parliament in England. One of the defendants, being a member, was arrested on the 29th of November, 1851, under an attachment issued against him as an attorney for the non-payment of a debt. The last preceding session during which he had been a member expired on the 30th of August, 1851, and that parliament was dissolved on the 6th of November following. On the 10th of December he was again elected, and in February applied to be discharged on the ground of privilege.

Held, that he was not privileged under the first election, as at the time of arrest he was not a member, and more than forty days had elapsed from the close of the last session; but that he was entitled to discharge as a member of the new parliament, having been arrested within forty days next before the return of the writ of election. The return at the new election was held sufficiently proved by the affidavit of the applicant. *The Queen v. Gamble & Boulton*, 546.

PARTNERSHIP.

See ATTORNEY, 2.

One partner having received the benefit of a deed executed by his co-partner in the name of the firm, held bound.—Where an agreement under seal, but of a nature not requiring a seal, was executed by one of two partners in the name of the firm, and the partner not executing afterwards acted under, and received the benefit of it, such agreement was sustained as his deed: and it was held that he

could not be allowed to dispute the authority by which it was executed in his name. *Bloomley v. Grinton & Watkins*, 455.

PATENT (GRANTING LAND.)

See CROWN GRANT.

PENAL ACTION.

For buying disputed titles.]—A testator died leaving a will, by which he directed that his debts should be paid as soon as practicable after his decease," and gave and bequeathed to his executrix and executors all his real and personal property, in trust to sell, &c., such parcels or tracts of land as might be necessary for carrying his intention into effect. He then gave the residue of his real and personal property to his wife during her life, and after her death to such of her children as might then be living—share and share alike. About twenty years after his death his widow (who had married again), and one C. W.—for three of the children then living—conveyed one of the lots now in question to one G. R. in fee; and G. R. subsequently conveyed to one P. L., who was in possession when the now defendant took his deed. About the same time the widow and one of the sons conveyed the other lot, now in question, to the now plaintiff who was in possession when the now defendant took his deed for this lot. About sixteen years after these deeds were made the defendant took a deed of bargain and sale of both lots from all the surviving children.

Held, that there was nothing to prevent the children from conveying their reversionary interest: and that defendant was not liable in a *qui tam* action for purchasing a disputed title under 32. Hy. VIII. ch. 9. *Ross qui tam. v. Meyers*, 284.

PLACITA.

See EJECTMENT, 1.

PLEADING.

See ARBITRATION AND AWARD, 2.—BANKRUPT AND BANKRUPTCY.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 3. 4.—BOND—BUILDING SOCIETIES, 3.—CONDITION.—DOWER, 2.—EASEMENT.—FALSE IMPRISONMENT.—FOREIGN JUDGMENT.—INFORMATION.—LEAVE AND LICENSE, 1.—MAGISTRATES, 1.—MESNE PROFITS.—NUL TIEL RECORD, 2.—RECOGNIZANCE.—REPLEVIN.—REQUEST.—SEDUCTION.—TRESPASS.—TROVER.—USURY.—VERDICT.

Traverse of due notice as alleged in two counts.]—1. To two counts of a declaration each charging defendants as maker and indorser respectively of a separate promissory note, one of the defendants (the indorser) pleaded that he had not due notice of the non-payment of the said promissory notes.

Held, that the plea being distributive, did not raise too large an issue, and was good on special demurrer. *Tompkins v. Scott et al.* 103.

Title under purchase at sheriff's sale.]—2. Where a title is pleaded by purchase at sheriff's sale under a *fi fa.*, the judgment supporting such *fi. fa.* should be set out, and it should be averred that the sheriff seized while the writ was in force. *McDonell v. McDonell*, 259.

Declaration against magistrates for not returning conviction.]—3. A declaration charging that the return was made to the next ensuing Quarter Sessions of the peace is bad—the statute requiring a return to the next ensuing general Quarter Sessions. *Metcalf qui tam. v. Reeve & Gardner*, 263.

Assumpsit for rent—Plea of title vested in the Ordnance department.]

—4. Assumpsit for rent. *Plea*—that after the demise the estate became vested in the principal officers of H. M. Ordnance, by virtue of the statute 7 Vic. ch. 11, and thereupon the estate of the plaintiff ceased and was determined; that the said principal officers gave the defendant notice of this change in the title, and not to pay over the rent to the plaintiff; and that the defendant is now liable to them for the use and occupation of the premises.

Held, not double or bad as amounting to the general issue.

Held also, that it was not necessary to negative in the plea any promise from the said principal officers to the plaintiff of a lease or conveyance of the premises even if the statute required them to grant it, for that such an interest should have been replied by the plaintiff. *Cunningham v. Duane*, 274.

POSSESSION.

How far primâ facie evidence of seizin.]—See “Evidence,” 1.

PRACTICE.

See CERTIORARI—COSTS—COMPUTATION—EVIDENCE, 4—NEW TRIAL—VERDICT.

Rule to quash by-law—time for answering.]—By 12 Vic. ch. 81, sec. 155, corporations have not less than eight days to answer a rule nisi for quashing any of their by-laws: therefore a rule granted and served on the first Saturday in term is not returnable within that term. *In re Sams v. The Corporation of Toronto*, 181.

PRACTICE COURT.

By-law.—Judge in Practice Court

has no authority to entertain an application for quashing a by-law of a corporation. *Ib.*

PRESCRIPTION.

See EASEMENT.

PRINCIPAL AND AGENT.

See INDIAN INSURANCE.

PRINCIPAL AND SURETY.

See GUARANTEE—COVENANT, 4.

Bond—Cognovit.]—The defendant was one of two sureties in a bond, on which the obligees sued. An arrangement was made between his principal, his co-surety, and the plaintiffs to which he did not consent as to himself, but to which he offered no objection as regarded his principal and co-surety. Subsequently, an action being brought on the bond against him he allowed judgment to go by default, and gave a cognovit reserving any means he might have in equity to relieve himself. He now applied to set aside the judgment and cognovit, which, under the circumstances, the Court held could not be done. *Municipal Council of Essex, Kent, and Lambton v. C. Baby*, 34.

PRIVILEGE.

See PARLIAMENT.

PROMISSORY NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROTEST.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

Payment under, effect of.]—The fact of a payment having been made under protest, but without duress, or assent on the part of the payee to any

reservation of his right, would form no ground for an action to recover back the money. *Doe dem. Morgan et al. v. Boyer*, 318.

PROVISO—TRIAL BY.

Where the plaintiff's attorney, at the defendant's request, countermanded notice of trial, and the defendant's attorney did not object, or afterwards move for judgment: *Held*, that the case could not be taken down to trial by proviso at the following assizes. *Doe dem. Davidson et al. v. Gleeson*, 607.

QUARTER SESSIONS.

Distinction between "Quarter Sessions" and "General Quarter Sessions."]—See "Pleading," 3.

RECOGNIZANCE.

Recognizance of bail taken after judgment—Averment of suit pending.]—Debt on a recognizance of bail. The declaration set out the condition, "that if it should happen that the said D. M. should be convicted at the suit of the plaintiff, in a certain plea of trespass in the case upon promises to the plaintiff's damage of 100*l.*, then the defendants consented and agreed that all such damages as should be adjudged unto the said plaintiff, &c.

Held, the pleas being specially demurred to, that it was sufficiently averred that the recognizance was entered into a suit *then pending* between the plaintiff and the principal: and that the defendants were therefore estopped from pleading that at the time of making the recognizance there was no such action.

The defendants pleaded that the debtor was surrendered within the time in which he could be *lawfully* surrendered, and that he was afterwards discharged as an insolvent debtor.

Held on special demurrer plea bad. *Semble*, that the defence intended to be set up is not sufficiently brought out by the pleas in this case.

Mitchell v. Noble et al., 555.

REGISTRY.

See DEED, 1—EVIDENCE, 2—JUDGMENT—MORTGAGE.

RELEASE.

See DEED, 2—MUNICIPAL CORPORATIONS, 1.

REPLEVIN.

Action on replevin bond—Pleading.]—1. Debt on a replevin bond against J. C. principal, and C. P. and R. H. sureties. 4th plea—That J. C. commenced his suit without any delay and prosecuted the same, (not adding without delay). 5th plea—That J. C. commenced a suit without delay, and "from thence hitherto hath prosecuted the said suit without delay."

Demurrer to each plea, as evasive, and no answer to the breach assigned.

Held 4th plea bad: 5th plea good. *Casswell et al. v. Catton et al.*, 282.

Replevin bond—Condition of—What delay allowable—Evidence.]—2. Action on a replevin bond, assigning as a breach that the suit was not prosecuted with effect and without delay. The defendants pleaded that an action was commenced and prosecuted without delay, according to the true intent and meaning of the condition; and to this the plaintiff replied, that after the commencement of the action an unreasonably long time was allowed to elapse without taking any further steps therein, adding a special traverse of the due diligence alleged.

Held, that under these pleadings the defendants should have been allowed

to give evidence of circumstances shewing a reason for the delay of more than a year after the writ of replevin was sued out. *Caswell et al. v. Catton et al.*, 462.

REQUEST.

Surety for return of goods on request—excuse for request.]—In an action against a surety who stipulates for the return of certain goods on request, it is not a sufficient excuse for the want of such request to allege that when the plaintiff required the goods the principal was out of the province. *O'Neill v. Carter*, 254.

ROAD.

See CONDITION—CROWN, 2.

SCHOOL TRUSTEES.

See COMMON SCHOOLS.

SEAL.

See CROWN GRANT, 1.

What constitutes a sealed instrument.]—To an action of covenant on a deed, the defendant pleaded "*non est factum*." It appeared that he had signed the deed and afterwards merely marked the paper with the end of a poker, opposite to his name, not even acknowledging the mark as his seal.

The court held this not sufficient to constitute a sealed instrument, and ordered a nonsuit to be entered. *Clement v. Donaldson*, 299.

SEDUCTION.

Traverse of service not allowed—7 *Wm. IV., ch. 8.*]—Action for seduction of one C. M., the daughter and servant of the plaintiff. *Plea*—That the said C. M., was not the servant of the plaintiff.

Held, that the plea was bad, for traversing an inference of law; and that the court could not intend that C. M. was a married woman in order to support it. *McLeod v. McLeod*, 331.

SET-OFF.

Promissory Note—Set-off—Barter.]—A. sold to B. certain goods, and a claim on one C. for 25*l.*, taking a horse in payment of the goods, and B.'s promissory note for the claim. B. took from A. an order for the goods on the warehouseman in whose charge they were, but on presenting the order he was unable to obtain them,

Held, in an action by A. against B. on the note, that the defendant might set off the value of the horse. *Wright et al. v. Cook*, 605.

SHERIFF.

Wilful misconduct of—Liability of his sureties.]—1. The sheriff having availed himself of the Interpleader Act to try a disputed claim to goods, it was part of the arrangement directed by the court on making the interpleader order, that in the meantime the sheriff should sell the goods, taking satisfactory security for the payment. The sheriff did sell, and took as security an undertaking from parties not resident within the jurisdiction of the court, which security he subsequently offered to assign to the now plaintiff, in whose favor the issue had been found, but it was declined. Being subsequently pressed by plaintiff to give him the benefit of his writ, he made a return of *nulla bona*; and *held*, that this amounted to such wilful misconduct as rendered the sheriff and his sureties liable. *Clandinan v. Dixon et al.*, 266.

Indemnity bond, void condition—Estoppel—Liability of defendant.]—2. The sheriff, holding execution against

the defendant at the suit of different parties, took from him a bond reciting that he had seized his goods, and indemnifying the sheriff "against any loss, damage, or liability, which may be incurred by reason of the execution, wrongful execution, or non-execution of the said writ. The sheriff afterwards sold the goods contrary to the defendant's wish, who informed him that they belonged to one G.—G. brought trover against the sheriff, proved a *bonâ fide* bill of sale, recovered the value of the goods, and registered his judgment. The sheriff then sued the defendant on his bond.

Held, first, that the defendant was not estopped by the recital from denying his property in the goods.

Secondly, That although the damage accruing to the sheriff came literally within the condition of the bond, yet that the defendant, having expressly objected to the sale, would not be liable.

And *semble*, that such a bond would at all events be void at common law, as being an indemnity to the sheriff for disobeying the command of the writ. *Corbett, Sheriff, v. Hopkirk*, 479.

SHERIFF'S SALE.

See TAXES—TITLE.

Land improperly described in fi. fa.—1. The plaintiff's attorney directed the sheriff to sell under a *fi. fa.* certain lots, describing them by mistake as being in the township of H., instead of M.; but the numbers of the lots and concessions given being correct. After the sale the error was discovered, and the sheriff then advertised and sold the proper lands under the same *fi. fa.*, which had expired.

Held, that the sale could not be supported. *Doe dem. Burnham v. Simmonds*, 436.

Fi. fa., amendment of—Sale under while erroneous.—2. On a judgment

in assumpsit a *fi. fa.* was issued in debt, and afterwards amended by rule of court. Before the amendment the sheriff had sold the land and given a deed, under which the plaintiff claimed. It was objected that the sale was void, having been made under an erroneous writ; but held that the objection could not be entertained.

And *quære*, whether the sale would have been voidable if moved against at the time of making the application to amend. *Doe dem. Elmsley et ux. v. McKenzie*, 559.

SHIP REGISTRY ACT.

Ship registry Act 8 Vic. ch. 5, § 13, 16, 21—Necessity of compliance with. to effect a valid sale of shares.]—Where an action was brought for breach of contract in refusing to sign certain promissory notes, the sale and delivery to the defendants of shares in a schooner being alleged as the consideration for the promise: and it appeared that the plaintiff had surrendered his interest to the defendants, and that they had continued in exclusive possession of the vessel; but that no assignment had been made as the statute directs, and no transfers indorsed on the registry, nor any new certificate of ownership granted: the court ordered a nonsuit. But if the defendants had given their notes, they could not have resisted payment on the ground that they had not received a valid title. *Orser v. Mounteny et al.* 382.

STATUTES (CONSTRUCTION OF.)

- 32 Hen. VIII. ch. 9—Penal Action.
- 33 Hen. VIII. ch. 9—Costs, 2.
- 33 Hen. VIII. ch. 20—Inquisition.
- 13 Eliz. ch. 4—Will, 3.
- 22 & 23 Car. II. ch. 9—Costs, 1.
- 29 Car. II. ch. 3—Frauds (Statute of.)
- 21 Jac. I. ch. 14—Information.
- 21 Jac. I. ch. 16—Limitations (Statute of.) 4.
- 31 Geo. III. ch. 31—Crown Grant, 2.

- 59 Geo. III. ch. 7—Taxes, 2.
 2 Geo. IV. ch. 1—Interest.
 1 Wm. IV. ch. 11—Marmora Foundry Co.
 2 Wm. IV. ch. 5—Absconding Debtor.
 3 Wm. IV. ch. 9—Dower, 1.
 4 Wm. IV. ch. 1, § 17—Limitations (Statute of.)
 7 Wm. IV. ch. 8—Seduction.
 1 Vic. ch. 31—Joint Stock Company.
 3 Vic. ch. 46—Taxes.
 3 & 4 Vic. ch. 78—Crown, 1.
 4 & 5 Vic. ch. 10—Crown, 2.
 4 & 5 Vic. ch. 10—Condition.
 4 & 5 Vic. ch. 10—Municipal Corporations, 2, 9, 10, 12.
 4 & 5 Vic. ch. 12—Magistrates, 1.
 4 & 5 Vic. ch. 12—Pleading, 3.
 4 & 5 Vic. ch. 26—Magistrates, 2.
 4 & 5 Vic. ch. 100—Crown, 1.
 7 Vic. ch. 10—Bankrupt and Bankruptcy—Bills of Exchange, &c. 5.
 8 Vic. ch. 13—*Capias ad respondendum*.
 8 Vic. ch. 20—Fences.
 8 Vic. ch. 5—Ship Registry Act.
 8 Vic. ch. 45—Sunday.
 9 Vic. ch. 90—Bond, 1, 3; Building Societies, 1, 2.
 9 Vic. ch. 34—Deed, 1.
 9 Vic. ch. 34—Judgment.
 10 & 11 Vic. ch. 5—Prescription.
 10 & 11 Vic. ch. 15—Insolvent, &c.
 10 & 11 Vic. ch. 68—Montreal Mining Company.
 12 Vic. ch. 31—Crown, 1.
 12 Vic. ch. 63—Parliament.
 12 Vic. ch. 70—Witness.
 12 Vic. ch. 74—Mortgage.
 12 Vic. ch. 78—Districts; Municipal Corporations, 13.
 12 Vic. ch. 79—Attachment.
 12 Vic. ch. 81—Municipal Corporations, 4, 5, 6, 7, 10, 13.
 12 Vic. ch. 81—Practice.
 ————Statute Labour, 2.
 12 Vic. ch. 83—Municipal corporations, 5.
 12 Vic. ch. 197—Alien.
 13 & 14 Vic. ch. 29—Bond, 1, 3; Building Societies, 1, 2.
 13 & 14 Vic. ch. 48—Common Schools, 1, 2.
 13 & 14 Vic. ch. 55—Parliament.
 13 & 14 Vic. ch. 54—Elections.
 13 & 14 Vic. ch. 65—Municipal Corporations, 7.
 13 & 14 Vic. ch. 67—Municipal Corporations, 13.
 13 & 14 Vic. ch. 67—Statute Labour, 3.
 14 & 15 Vic. ch. 54—Magistrates, 2.
 14 & 15 Vic. ch. 66—Witness.
 14 & 15 Vic. ch. 109—Municipal Corporations, 3, 8, 13.

14 & 15 Vic. ch. 110—Municipal Corporations, 13.

14 & 15 Vic. ch. 114—Ejectment.
 14 & 15 Vic. ch. 170—Evidence, 7.

STATUTE OF FRAUDS.

See FRAUDS (STATUTE OF.)

STATUTE LABOUR.

A proprietor of land cannot be compelled to do statute labour in the township in which the land lies, unless he is himself resident there.]—1. *Moore v. Jarron*, 233.

Who liable to, in villages.]—2. The municipal council of a village has authority to impose the performance of statute labour, or a tax in lieu thereof, only on those inhabitants who are not otherwise assessed. *In re the Executors, &c., of Dickson v. the Municipal Council of Galt*, 257.

Non-resident proprietors, how assessed for statute labour—13 & 14 Vic. ch. 67.]—3. Where a non-resident owns several lots of land in the same township or county, he is chargeable on account of statute labour with the rate of commutation estimated with reference to the value of such lots separately, and cannot claim to have them rated according to their aggregate value. *The Canada Company v. Howard*, 654.

SUNDAY.

Note made on Sunday in payment for goods sold, not void in the hands of an innocent indorsee.]—Under 8 Vic. ch. 45, sec. 2, a note made on Sunday in payment of goods made on that day is void as between the original parties, but not as against an indorsee for value, and without notice. *Houliston v. Parsons*, 681.

SURETY.

For the return of goods on request.]—See "Request," "Guarantee."

SURETIES FOR SHERIFF.

See SHERIFF, 1.

TAVERN LICENSE.

See MUNICIPAL CORPORATIONS, 7.

TAXES.

3 Vic. ch. 46—*Lands improperly sold under, after sheriff's receipt.*]

1. Ejectment. The defendant proved that on the 19th of June, 1839, he bought the land in dispute at sheriff's sale, and on the 19th of August, 1842, received the sheriff's deed. The plaintiff produced the sheriff's receipt, dated 14th July, 1836, for all arrears of taxes due up to the 1st July, 1835. When this payment was made to the sheriff, he held in his hands a warrant to levy the amount due for taxes on the land. The lot was duly advertised by him on the 4th of June, 1840, pursuant to the statute 3 Vic. ch. 46.

Held, that, as the payment was made to the sheriff and not to the treasurer, the statute 3 Vic. ch. 46, was not applicable; and that the plaintiff, having shewn an otherwise good title, was entitled to recover. *Doe dem. Sherwood et al. v. Mattheson*, 321.

Sale of lands for taxes. Lands returned in June, 1820, liable for that year—59 Geo. III. ch. 7; 6 Geo. IV. ch. 7; 9 Geo. IV. ch. 3.]—2. Under 59 Geo. III. ch. 7, lands returned in the surveyor general's schedule in June, 1820, were liable to have taxes charged against them on the 1st of July following, which taxes for the first year were to be then assessed for 1820, so that, if not paid, there would be eight years' taxes in arrear on the 1st of January, 1828. Such lands having been sold under a warrant which described the taxes on them as being in arrear from the 1st of July, 1820, to the 1st of July, 1828, the sale was upheld: for eight years' taxes

4 y—VOL. IX. Q.B.

being really due, the mistake in the time of commencement was unimportant, and could not vitiate the warrant. *Doe dem. Stata v. Smith et al.* 658.

TITLE.

See ALIEN.

Covenant for—*When action will not lie.*—See "Covenant," 3.

Under purchase at Sheriff's sale.]—See "Pleading," 2.

Of Purchaser of lands at Sheriff's sale—*Objections to, by heir of defendant in the original suit.*—The plaintiff made title under a purchase at sheriff's sale, and produced the sheriff's deed, under which he had held possession, by his tenants, for several years. The defendant, being the heir of the defendant in the original suit, entered; and on action brought, objected that there were goods of his ancestor which might have been seized, and that the plaintiff had not proved a *fi. fa.* goods returned *nulla bona*.

These objections were overruled at *Nisi Prius*, and the jury having found for the plaintiff, the court afterwards refused a rule *nisi* for a new trial. *Doe dem. Meyers v. Meyers*, 465.

TORONTO (CITY OF.)

Title of Corporation.]—"Corporation of Toronto" insufficient to designate the Corporation of the City of Toronto. *In re Sams v. The Corporation of Toronto*, 181.

TREASON.

What lands vest in commissioners under 59 Geo. III. ch. 12.]—See "Inquisition."

TRESPASS.

See COSTS, 1.

Trespasserson Crownlands.]—See "Crown."

Pleadings—Evidence—Right of way—New assignment..]—1. Plaintiff declares for breaking and entering his close, &c. ; and in a second count for assault and battery. Defendant pleads to the first count, that there was a public highway across the said close, and that the plaintiff having wrongfully shut up the same, he removed the obstruction. To the second count, public highway across plaintiff's close—defendant passing over the same was prevented by plaintiff, and *moliter manus imposuit*.

Plaintiff replies to these pleas, traversing the highway as alleged, and then assigns for trespasses at other times, and for unnecessary damage. Defendant pleads not guilty to the new assignment.

Held per Cur.—Defendant having established a right of way, as alleged, and only one trespass being proved, which was committed in the said highway, and without excess, is entitled to a verdict. *Smith v. Ingoldsby*, 207.

Special plea, Argumentative denial of plaintiff's property..]—2. Trespass *de bonis asportatus*. Plea—justification, that the goods were the goods of one J. F., against which the defendant K. had sued out an execution: that J. F. fraudulently put them into the possession of the plaintiff, and that while there, the defendant C., as bailiff, and K., by his command, seized them.

Held, that this was properly a special plea; and not an argumentative denial that the goods belonged to the plaintiff. *Fallis v. Clause et al.* 272.

Averment of contra pacem..]—3. It is not necessary in a declaration in trespass to aver that the offence was committed "against the peace of our Lady the Queen." *Powell v. Currier*, 352.

Description of locus in quo..]—4. *Held*, that the description of the locus

in quo in this case was sufficient under the new rules. *Ib.*

When maintainable..]—5. The plaintiff contracted with one L. for the purchase of a lot of land, and paid down part of the purchase money. The agreement between them contained these words, "It is understood that the said C. has now possession, full control, and enjoyment of the said premises from this time forward; and that, if any person be now occupying the said premises, the said C. is to have full control thereof in all respects the same as if occupied by original bargain with him; also, that said C. assumes the said L.'s situation in respect thereto in full." When this arrangement was made, one J. was living on the place by L.'s permission. The plaintiff went upon the land, and found several persons employed by the defendant in cutting timber there; he informed them and J. of his purchase, and forbade further trespasses. J. was also desired by him to go off the place, but refused. The defendant rested his defence upon J.'s right to sell him the timber, which was not sustained upon the evidence.

Held, that the plaintiff might maintain trespass against the defendant, or against J., for anything done illegally after his entry, if not for all that had been done after he had purchased. *Church v. Foulds*, 393.

Pleading—Evidence..]—6. The defendant, a bailiff of a division court, having an execution against J. L., went to him and seized a yoke of oxen, which he allowed him to retain on receiving an acknowledgment of the levy indorsed on the writ. J. L., absconded, leaving the oxen with the plaintiff. The defendant took them away, whereupon she brought trespass alleging that she had received them, from J. L. on the day of his departure, in payment of a debt.

Held, that under a plea denying the

plaintiff's property, it was competent for the defendant to give in evidence the execution and seizure under it.

Held also, that by the acknowledgment given, the debtor had put it out of his power to transfer the goods seized. *Lossing v. Jennings*, 406.

Justification under a warrant of distress—Motives of defendant, when may be enquired into.—7. To an action of trespass *quære clausum fregit* the defendant pleaded justifying the entry under a warrant of distress, and the plaintiff replied *de injuria*.

Held, that under these pleadings, and under the facts proved, there could be no enquiry into the defendant's motives: that the plaintiff, having prevented the defendant from distraining was not at liberty to shew that he had no intention of executing the warrant when he entered, *although nothing was done inconsistent with such an intention*. (This case was distinguished from *Lucas v. Nockelles*). *Scott v. Vance*. 613.

TROVER.

Evidence—Pleading.—An agreement that the plaintiff should deliver the deed to the defendant to be returned on certain conditions, need not be specially pleaded, but would be admissible either under "not guilty," or "license," as it negatives the alleged wrongful conversion. *Dowling v. Miller*, 227.

USE AND OCCUPATION.

Liability for.—1. The defendant made over to the plaintiff a farm in part payment of a debt, stipulating for a re-conveyance on payment of the sum for which it was accepted, with interest, in three years. Before this arrangement the farm was leased to one F., who continued in possession, paying rent to the defendant.

Held, that the defendant was not

liable to the plaintiff for the use and occupation. *Matthie v. Rose*, 602.

Mortgagor not liable for.—2. A mortgagor continuing in possession is not liable to the mortgagee for rents and profits, or in general for waste, *Wafer v. Taylor and McLean*, 609.

USURY.

Promissory note given for interest on a usurious mortgage—Pleading.]

—Assumpsit. 1st count on a promissory note for 93*l*. 2nd count on account stated. 3rd plea to first count: setting up the defence of usury; and averring that it was corruptly agreed between the defendant and one A.B., that A. B. should lend to the defendant 200*l*., and that the defendant should pay therefor the sum of 21*l*. yearly interest: that A. B. should convey to the defendant certain land in O. for the pretended price of 150*l*., and take a mortgage of certain other land for 350*l*., with legal interest thereon; and that on a certain day named the defendant should pay to A. B. 200*l*. and reconvey the land in O., in full satisfaction of the mortgage: that this agreement was carried out; and that the note sued upon was given to the defendant, as agent for the assignees of the estate of A. B., for 84*l*. being interest due on the 350*l*. in the mortgage mentioned.

Held on demurrer, that the plea was sufficient, and that the facts stated shewed clearly a case of usury.

The 5th plea to the second count set out the same agreement, but did not aver that the account was stated of the interest due on the mortgage, or shew that the plaintiff was in any way connected with the usurious contract, and for these objections it was held bad. *Twyman v. Bingham*, 409.

VARIANCE.

In a name.—See "Bills of Exchange and Promissory Notes," 4.

Guarantee—Amount of rent.—The plaintiff charged the defendant on a guarantee for the payment of a certain rent—to wit, 2*l.* per month. The evidence shewed an agreement to pay only 1*l.* per month.

Held, a fatal variance, notwithstanding that the amount of rent was laid under a *videlicet*. *O'Neill v. Carter*, 470.

VENDOR AND PURCHASER.

Power of Crown to cancel sale to vendee after receipt.—See “Crown,” 1.

VERDICT.

A defendant succeeding on a plea of justification is not necessarily entitled to a verdict on the general issue. *Scott v. Vance*, 613.

WAIVER.

Cognovit given after nonsuit in ejectment.—Plaintiffs were nonsuited for not confessing lease, entry, and ouster. Subsequently to the trial, defendant executed a cognovit.

Held per Cur., on motion for a new trial, that defendant's having confessed judgment was a waiver of any formal exception he might have. *Doe dem. Kerr & Kerr v. Schoff*, 180.

WARRANT.

Of attachment, under 12 Vic. ch. 79—Who may execute.—See “Attachment.”

To sell land for taxes.—See “Taxes,” 2.

WILL.

Capacity to devise—Exception in 4 Wm. IV. ch. 1, sec. 17.—1. The effect of the exception in 4 Wm. IV. ch. 1, sec. 17, in favor of a grantee of the crown, who has never gone into

possession, is, that while ignorant of the fact of his land being in the actual possession of some other person, he is not to be regarded as disseized, and consequently is in a condition to devise. *Doe dem. McGillis et al. v. McGillivary et al.*, 9.

Construction of—Devise on condition—2. The testator devised certain land's to his brother's two eldest sons, “in case of *their* coming to Canada, and claiming the same.”

Held, by *Robinson, C.J.*, and *Burns, J.*, that, though the devisee took as joint tenants, yet that either of them by coming to Canada, could entitle himself to his moiety.

Draper, J., dissentiente, who held that the condition in the will was entire, and while unperformed in any part no estate could pass. *Ib.*

Construction of.—3. C. died, leaving a will, which, after disposing of certain real property, proceeded as follows: “all the rest and residue of my real as well as personal estate, which I may die seized or possessed of, *in reversion, remainder, or contingency*, I will, devise, and bequeath unto my beloved wife Catharine, in trust, to sell or dispose of any part or parcel thereof for the payment of my just debts, and to use and enjoy in such a manner as in her prudence and discretion will be most conducive to her own comfort and that of her children and grand-children, during the term of her natural life,” &c. Afterwards the testator added a codicil, referring to certain land obtained by him since the execution of the will and bequeathing the same as follows: “I do now therefore by this codicil, to this my last will annexed, give and devise the said parcel or tract of land, as it is in the same deed and surrender more particularly described, to the same persons, my beloved wife and children, *to whom I have devised all the rest and residue of my real estate*

in my will hereunto annexed," adding the usual words of publication.

The testator, at and before his death was Deputy Superintendent General of Indian Affairs, and trustee of the Six Nation Indians, and as such superintendent was an accountant to the crown, and at the time of his death he was indebted as trustee.

Held first—that the testator was not a public accountant within the meaning of the 13 Eliz. ch. 4; and that the crown could have no authority to sell his land under that statute.

Secondly—That the codicil referring expressly to the will, must be looked upon as forming part of it; and that taking the two together, the will might be construed to include all the testator's lands of which he should die seized or possessed, and not only those in reversion, remainder, or contingency. *Doedem. Dickson et ux. v. Gross*, 580.

Mere date of will being 30 years old not sufficient to dispense with proof.—4. The mere fact of the date of a will being thirty years old is not sufficient under all circumstances to

prove that it is the real age of the writing even if it comes from the proper custody; but some proof must be given of a concurrent possession of the property consistent with it, or of the existence of the will for thirty years. *Doe Stephens et al. v. Clement*, 650.

WITNESS.

12 Vic. ch. 70; 14 & 15 Vic. ch. 66.]—4. The defendant on his trial upon an indictment cannot give evidence for himself, nor can his wife be admitted as a witness. *The Queen v. Humphreys*, 337.

Construction of 14 & 15 Vic. ch. 66.—By the 14 & 15 Vic. ch. 66. the parties to a suit are admissible as witnesses in their own behalf. *Brennan v. Prentiss*, 372.

WORDS (CONSTRUCTION OF.)

"Taxable Inhabitants."—See "Common Schools," 2.

"Yearly proportions"—money made payable in.—See "Agreement," 1.



